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SIXTH REPORT ON INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

by

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INTRODUCTION

A. The first 10 articles 1/

1. The latest debate in the International Law Commission and in the Sixth Committee on the issue of liability for acts which are not prohibited deserves some comment. First of all, it should be pointed out that many of the suggestions made during those debates could be reflected in the final texts of the first articles which were submitted then. Furthermore, the rewording of articles 1 to 9 proposed during the latest debate by some colleagues is, by and large, an improvement on the original texts. They were the product of successive drafts which incorporated ideas stemming from various quarters, and it is clear that the desire to remain true to these ideas has, at times, resulted in cumbersome or clumsy juxtapositions which must be remedied. The Drafting Committee will therefore have available to it the "official" version of the 10 articles which were originally referred to it for consideration. It will also have, as additional data, the texts of the first nine articles which were submitted with the fifth report of the present Special Rapporteur (A/CN.4/423 and Add.1 and 2); these were an attempt to incorporate the comments made during the debate on these original 10 articles. 2/ It will also have the many comments on those nine articles and the useful drafting suggestions made during the debate last year. Annexed to this report there is a general list of the articles submitted thus far, to which the Special Rapporteur has added, in footnotes to some of the first nine articles, a text for the Drafting Committee's use; this text seeks to incorporate what he considers the comments most worthy of consideration from the recent debate, and even some of the drafting suggestions. Naturally, this does not prevent the Committee from also considering the other proposed amendments or even others which it may wish to suggest.

2. So much for what has happened with the first nine articles up to the latest debate. If the amendments now being submitted to the Commission for consideration are accepted, we would eventually have to change the original numbering as proposed in the aforesaid annex. The first nine articles would again become 10 if the principle of "non-discrimination" which is being submitted to you for consideration proves acceptable. Two types of changes could be made in article 2, concerning the use of terms: firstly, amendments needed to adapt the article to the new technique for defining dangerous activities (subparagraphs (a), (b), (c), (d), and (e)) and, secondly, amendments arising from the comments made during the above-mentioned latest debates and from further consideration of the issue (subparagraph (f), the

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1/ In connection with the references in this report to the latest text of the 33 draft articles proposed by the Special Rapporteur, including the amendments proposed to draft articles in earlier reports, see section VII "Annex" containing the general list of articles.

2/ The proposal made during the latest debate, and unanimously accepted by the Commission to delete article 8 concerning participation, reduces the 10 original articles to nine.

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last sentence of subparagraph (g), and subparagraphs (h), (k), (l), (m), and (n)). In addition, a new principle, that of "non-discrimination", would be added to the relevant chapter.

B. Activities involving risk and activities with harmful effects

3. The question whether activities involving risk and activities with harmful effects should be considered separately has already been dealt with. The conclusions drawn following further examination of the issue are not very different from the preliminary conclusions outlined in the Special Rapporteur's summary, 3/ namely, that the two kinds of activities have more features in common than they do distinguishing features, so much so that one might consider the possibility of dealing with their consequences in a similar manner, that is to say, of bringing them together under a single legal régime. The draft rules on compensation for damage to the environment prepared by the Council of Europe 4/ - which in fact deal with liability for dangerous activities 5/ - also cover activities which cause harm as a result of continuous pollution, 6/ without apparently differentiating between the legal treatment accorded to such activities and that accorded to activities which cause pollution accidentally.

4. The other model which could be followed would be that of the legal principles and recommendations on environmental protection and sustainable development drawn up by the Experts Group on Environmental Law of the World Commission on Environment

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3/ International Law Commission. Provisional summary record of the 2121st meeting, document A/CN.4/SR.2121, pp. 11-12.

4/ See Secretarial Memorandum prepared by the Directorate of Legal Affairs, CDCJ (89) 60, Strasbourg, 8 September 1989, para. 15, p. 6.

5/ They were entitled "Rules on compensation for damage to the environment", but since they seek to provide compensation not only for that type of harm, "it may be wondered whether their most appropriate title should not be 'Rules on compensation for damage resulting from dangerous activities'". (ibid., para. 17, p. 7).

6/ "It was also wondered if the régime for civil liability proposed in the draft rules should apply only to damage resulting from accidents or other sudden incidents, or if it should apply also to damage resulting from continuous pollution. Advocates of the first approach, in a minority, maintained that except in the case of accidents, it would be very difficult to establish a causal link between damage and an incident attributable to an operator or a number of operators ... Although the compensation for some types of damage arising from continuous or synergic pollution may not be obtained by virtue of the rules, unless it was possible to establish a sufficient link with the activities of one or several operators, it was decided in the end that this one circumstance did not justify excluding non-accidental damage" (ibid. para. 15, p. 6).

and Development. 7/ This model distinguishes between activities that create a risk of "substantial" transboundary harm and those which actually cause "substantial" transboundary harm, and the two are accorded different legal treatment. The former would, broadly speaking, correspond to our "activities involving risk", the latter to what we have called - for want of a better term - "activities with harmful effects". In order that they may be considered an exception to the general rule set forth in the preceding article (article 10), which establishes simply the obligation of the State of origin to "prevent or abate any transboundary environmental interference or a significant risk thereof which causes substantial harm - i.e. harm which is not minor or insignificant", that is to say, a rule prohibiting the causing of transboundary harm or the creation of a risk thereof, the costs of preventing or reducing the harm or risk, as the case may be, originating in such activities must outweigh the benefits which such prevention or abatement would entail.

5. Article 11, therefore, deals with activities involving risk and states:

> "1. If one or more activities create a significant risk of substantial harm as a result of a transboundary environmental interference, and if the overall technical and socio-economic cost or loss of benefits involved in preventing or reducing such risk far exceeds in the long run the advantage which such prevention or reduction would entail, the State which carried out or permitted the activities shall ensure that compensation is provided should substantial harm occur in an area under national jurisdiction or another State or in an area beyond the limits of national jurisdiction.
>
> 2. A State shall ensure that compensation is provided for substantial harm caused by transboundary environmental interference resulting from activities carried out or permitted by that State notwithstanding that the activities were not initially known to cause such interferences." 8/ (The emphasis is ours.)

This article envisages so-called "ultrahazardous activities" and imposes strict international liability on the State which authorized such activities.

6. The Experts Group finds the basis for such causal or strict liability in a number of treaties such as the Convention on International Liability for Damage caused by Space Objects 9/ and the 1973 Treaty concerning the Rio de la Plata and the Corresponding Maritime Boundary between Argentina and Uruguay (article 51 on pollution of the waters), but it points out that the State of origin may fulfil its

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7/ See Environmental Protection and Sustainable Development, Legal Principles and Recommendations, adopted by the Experts Group on Environmental Law of the World Commission on Environment and Development. (London, Dordrecht and Boston, Graham and Trotman, Nihoff).

8/ Op. cit., p. 81.

9/ General Assembly resolution 2777 (XXVI), annex.

obligation by imposing a causal or strict liability upon the developer or operator, and in support of this solution it quotes numerous conventions which have already been cited several times in our reports and in the debates of the Commission: the 1952 Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, 10/ and, of course, the Vienna (1963) and Paris (1960) Conventions on liability for nuclear damage; the Brussels Conventions, one of them supplementary to the above-mentioned Paris Convention and the other on liability of operators of nuclear ships; the 1969 Brussels Convention on Civil Liability for Oil Pollution Damage and the 1967 London Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Sea-bed Mineral Resources. 11/ The experts also state that:

> "It is typical for the treaties concerning the peaceful use of nuclear energy that they provide for a subsidiary and supplementary liability of the installation State or flag State - that is, subsidiary and supplementary to the primary liability of the operator or owner of the installation or vessel - to guarantee the indemnification of nuclear damage up to the maximum limit of liability envisaged in the treaty". 12/

That is to say, and this is an important precedent for the causal liability of the State at the international level, that the State puts itself exactly in the place of the private operator and assumes strict liability at the international level for certain amounts of money which the operator is unable to pay. The experts also mention a large number of countries which have incorporated the concept of strict liability into their domestic law and say that this is evidence of an emerging principle of national law recognized in the manner sated in article 38 (1) (c) of the Statute of the International Court of Justice (all of these are arguments which have been advanced at the appropriate moment in developing our thesis.)

7. Article 12 deals with another type of activity:

> "If a State is planning to carry out or permit an activity which will entail a transboundary environmental interference causing harm which is substantial but far less than the overall technical and socio-economic cost or loss of benefits involved in preventing or reducing such interference, such State shall enter into negotiations with the affected State on the equitable conditions, both technical and financial, under which the activity could be carried out.

10/ United Nations Treaty Series, vol. 310, No. I-4493.

11/ See footnote 7 above, pp. 81-82.

12/ Ibid., p. 83.

2. In the event of a failure to reach a solution on the basis of equitable principles within a period of 18 months after the beginning of the negotiations or within any other period of time agreed upon by the States concerned, the dispute shall at the request of any of the States concerned, and under the conditions set forth in paragraphs 3 and 4 of article 22, be submitted to conciliation or thereafter to arbitration or judicial settlement in order to reach a solution on the basis of equitable principles."

The commentary states that:

"The transboundary environmental interference envisaged in the present article may be an instance of pollution involving substantial harm which can only be avoided by the entire termination or foregoing of the, in itself, highly beneficial activity, which gives rise to the interference." 13/

8. The different legal treatment accorded to the two activities seems to be based on the following: activities involving risk are considered legal, provided that all obligations have been met concerning due diligence in the prevention of an accident.

"As noted, the type of risk involving activities dealt with in paragraph 1 of article 11 may be regarded lawful provided all possible precautionary measures have been taken in order to minimize the risk. As we have also seen, the State who carries out or permits the ultrahazardous activities must ensure that compensation is provided should substantial extraterritorial harm occur. This is, in fact, nothing else than the fair and equitable price which ought to be paid for the lawful continuation of an ultrahazardous activity which, on balance, must still be regarded as predominantly beneficial." 14/

Here there would be no obligation to formulate a special régime between the interested parties since provision for one has already been made in the proposed articles: if all precautions of due diligence are taken and damage results even so, then such damage will be compensated through strict liability. On the other hand, with regard to activities in which the damage results from normal operation, the experts' conclusion is that: "Thus, in spite of the fact that the activity would cause substantial extraterritorial harm, it is not regarded either as clearly unlawful, or as clearly lawful. Instead a duty to negotiate on the equitable conditions under which the activity could take place has been provided for." 15/ There is not only a duty to negotiate but also a mechanism that, if followed, would be bound to lead to the creation of a régime for the activity in effect between the

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13/ Ibid., p. 86.

14/ Ibid.

15/ Ibid., p. 87.

parties and, according to what is implied in article 12, such a régime would have to establish compensation for the harm caused. 16/

9. The articles which we are commenting on seem to be based on the aforesaid philosophy which can be briefly summarized as follows: there would seem to be sufficient basis in international practice for formulating a general régime regarding strict liability which would govern activities involving risk, without the States concerned having to formulate a régime for each individual activity. In the case of the other activities, sufficient basis would not appear to exist: "However, the application of the principle of strict liability - and the idea of balancing of interests which it implies - to activities definitely causing substantial extraterritorial harm, is generally regarded as considerably more revolutionary than the application of that principle to activities which 'merely' involve a significant risk of harm as envisaged in paragraph 1 of article 11." 17/ Accordingly, it is stated in the report that the article which we are commenting on does not go as far as this and merely establishes the obligation to negotiate a régime between the Parties and a corresponding mechanism. This, notwithstanding the fact that we said earlier that there appears to be convincing support for the application of the principle (of strict liability) in such situations, since it, too, can be considered a general principle of national law recognized by civilized nations within the meaning of article 38 (1) (c) of the Statute of the Court. 18/

10. None the less, the above cannot be taken to mean that that set of norms looks more kindly upon activities with harmful effects than on activities involving risk simply because as a general rule it would not apply a régime of strict liability to the former. Quite the contrary: whereas activities with harmful effects are lawful in so far and so long as the measures dictated by due diligence are taken, activities involving risk are not yet legal until a consensual régime is in effect between the parties. Hence the need to find a mechanism to resolve any difference that may arise between the parties and to determine in a more or less automatic fashion the creation of a régime for such activity.

11. The Special Rapporteur is open to whatever preference the Commission may express. He finds, on the one hand, that it is difficult for States to agree to a binding dispute settlement mechanism such as that proposed in article 12 which we have just commented on - a veritable Procrustean bed - as a prerequisite for the lawfulness of activities under their jurisdiction or control. This obstacle arises so frequently in international relations that it is not worth dwelling on and some members of the Commission were not in favour of burdening the State of origin with too many legal formalities at the start of possible activities referred to in article 1. On the other hand, as he stated in his previous report, he would have some reservations about qualifying as "dangerous" an activity which is certain to cause harm, not as a result of an accident but in the course of normal operation,

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16/ Ibid.

17/ Ibid.

18/ Ibid.

as the Council of Europe draft rule seem to do, and he points out that the draft rules deal exclusively with liability, not with prevention, which is where the main differences between the two types of activity are to be found.

12. In fact, the main difference between the two types of activity is in the sphere of prevention. There are two types of preventive measures: (a) measures [or appropriate means] to prevent an incident from occurring, and (b) measures designed to contain or minimize the effects once an incident has occurred, as we shall see in greater detail later on. In (a) there is, as yet, no harm nor any incident; in (b) there is an accident (activities involving risk) or harmful effects have already been triggered (activities with harmful effects), but the harm is not yet quantifiable because measures are being taken to contain or reduce the effects, so that ultimately the harm may be less than the original effects might have caused if steps had not been taken to combat them. In the two types of activity under consideration, the difference is in that first stage, for in the case of activities involving risk, preventive measures are taken even though it is known that the accident may occur anyway. The harm occurs precisely as a result of an accident: it escapes the operator's control even though the operator takes due precautions. In the case of activities with harmful effects, if appropriate preventive measures are taken the effect does not occur nor, consequently, does the harm, in principle.

13. This, in outline, is what happens with both activities in the first stage or aspect of prevention. In the second stage, that is to say, when the accident has occurred or the effects have been triggered, there would seem to be no difference between the two activities. One possibility, inspired to some extent by this model, would be to differentiate between the two types of activity referred to in article 1, and to establish, in the case of activities with harmful effects, a genuine obligation to negotiate a régime setting forth the conditions on which the activity may be pursued, or as we said earlier, "... a duty to negotiate on the equitable conditions under which the activity could take place has been provided for".

14. The other possibility would be to compare the two types of activity and the practical effects, given the great similarity between them: namely, by stating that there is, in both cases, a need for notification, information and consultation between the States concerned, with or without the participation of international organizations depending on the case as we shall see, but that the "hard" obligations arise only when the harm has occurred and can be imputed causally to the activity in question. This seems justifiable in the area of prevention because although, as we have seen, there are differences between the two types of activity, it is virtually unthinkable to require prior international approval for the conduct of an activity; likewise, it is virtually unthinkable to leave it for the time being in a legal limbo in so far as its lawfulness is concerned. While awaiting better times, let us leave it as a simple obligation on the parties to consult one another in the event that an activity shows signs of having harmful effects, as is done in the draft articles in the case of activities involving risk. In so far as liability as such is concerned, it seems that it should be the same as in the case of activities involving risk: finally, our draft articles do not automatically impose strict liability but merely the obligation to negotiate compensation for harm caused. That is the least that one can ask for in the case of both forms of activity.

I. ACTIVITIES INVOLVING RISK

A. List of activities

15. It will be remembered that some representatives in the International Law Commission and the Sixth Committee spoke out in favour of a list of the activities covered by article 1. In view of certain objections, some expressed a preference for a flexible list, which could be revised from time to time by a group of experts and any amendments to which would be submitted to Governments for approval. Others suggested drawing up a list for guidance purposes only. The incomparable advantage of a list is that it would then define the scope of the draft precisely making it much more acceptable to States who would know the limits of their future liability. The tenor of subsequent debates in which this concept was discussed proves that the idea of a list continues to come up and has not been abandoned by a large segment of the Commission and the General Assembly. Arguments are still being raised against it, 19/ however, and the draft rules on compensation for damage caused to the environment, prepared by the Committee of Experts for the European Committee on Legal Co-operation of the Council of Europe, which we mentioned earlier and which, as we saw, are basically draft rules on civil liability for dangerous activities, recently discarded the possibility of a list of activities. On the other hand, they define these activities mainly in relation to the concept of dangerous substances, 20/ a list of which is annexed to the rules, and what is done with them: handling, storage, production - including residual production - or unloading, and other similar operations. It also includes: activities using technologies which produce hazardous radiation; the introduction into the environment of dangerous genetically altered organisms or dangerous micro-organisms; or the operation of a waste disposal facility or site. 21/ It goes on to define dangerous substances as those which create a significant risk (note that, as in our draft, the term significant risk denotes the acceptance of a threshold of risk) to persons or property or the environment, such as flammable and corrosive materials, explosives, oxidants, irritants, carcinogens, mutagens and

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19/ See Yearbook 1986 ..., vol. I, pp. 215-216, para. 5.

20/ In this respect, this draft is based on other instruments, particularly in the field of carriage: "As for other instruments, in particular in the field of carriage, the nucleus is made of operations on dangerous substances. These substances are here deemed dangerous on account of some properties (toxicity, ...) defined in internationally accepted classifications" (see CDCJ 89 (60), (footnote 4 above), p. 5, para. 12).

21/ Both hazardous radiation and dangerous genetically altered organisms or dangerous micro-organisms, and doubtless the waste handled in such facilities, could come under the broad category of substances, but it was deemed preferable to put them in a separate category. In short, the activities are dangerous because they involve handling either substances, micro-organisms, genetically altered organisms or waste.

toxic, ecotoxic and radiogenic substances as indicated in annex A to the rules under discussion. A number of other substances are included in annex B. The draft rules also state that the designation of a substance as dangerous may be restricted to certain quantities or concentrations, certain risks or certain situations in which that substance may occur. 22/ They then define both genetically altered organisms which present risk and dangerous micro-organisms.

16. This model is interesting, and perhaps better suited to a global convention than a list of activities such as that contained in the draft on Environmental Impact Assessment in a Transboundary Context. 23/ It offers greater flexibility and yet allows for considerable precision in the scope of the articles. It also removes some ambiguities which are inevitable in the kind of convention on which the Commission has been working until now. For example, in our draft, "appreciable" (or "significant") has two meanings in relation to "risk": it means risk (a) that presents a higher than normal probability of causing transboundary harm and (b) that can be detected simply by examining the facts. In short, "appreciable" describes a risk which is not only higher than normal in a human activity but also easily perceptible, or "foreseeable". With a list of substances, there would be no need to refer to the second meaning, because the mere fact that he is handling a dangerous substance serves to warn the operator - and, hence, the State of origin - that he may be subject to certain obligations, and this makes it necessary to conduct an examination and an evaluation which hitherto were required only if the risk was "appreciable" on simple examination. With regard to the first meaning, things are made considerably easier by establishing the relationship between the concept and the dangerous substance handled in the activity to which the term "dangerous" applies, for the situation is such that the likelihood of transboundary harm is, in principle, greater than in other activities.

17. On the question of greater flexibility, it should be noted that the listing of dangerous substances is not exhaustive. On the one hand, if substances are included that cast suspicion on the activities in which they are used, it remains to be seen whether the risk of transboundary harm is real. On the other hand, there may be other substances which are not listed but which are also known to cause the same effects, in which case the activities in which they are used could be considered as falling under article 1.

22/ This idea is not unlike the one contained in our article 2 (a): things which engender risk, either because of their intrinsic properties or because of the place, medium or manner in which they are used. The concentration of 200,000 tons of petroleum in a boat is dangerous because of the way in which it is handled, in other words, in a boat which can be shipwrecked or have an accident, with disastrous consequences for the nearest coast line.

23/ See ENVWA/AC.3/4.

B. Amendments to article 2 which the new formulation would entail

18. Simply in order better to visualize how the system of a list of dangerous substances would operate, the amendments, which including a list in the general provisions of our draft would entail, are examined below. A text of article 2 (use of terms) is given, whose first four subparagraphs incorporate the system of defining "activities involving risk" in the way we described. Other subparagraphs are then adapted as explained above. It goes without saying that these texts are only provisional, since their final wording will have to be drafted in consultation with experts. However, they have an authoritative precedent in the draft rules considered in the Council of Europe, which help us to make more practical use of the concepts.

19. There would be no problem in introducing certain amendments to the text of article 2 on the meaning of the terms used since, in any case - according to opinions stated and not contradicted in the Commission - the article is open to the introduction of new terms and the adaptation of existing ones to subsequent developments. Introduction of a list would have no effect on article 1. In general, the wording of the first four paragraphs follows that of the Council of Europe draft rules, except that "the operation of a waste disposal facility or "site" would be excluded from the concept of dangerous activity, since it seems to be already contained in the general idea of the handling of dangerous substances, of which waste is obviously one. Moreover, this concept of "dangerous substances" was, of course, thought up for the European region, whose predominant activities will have their own particular characteristics. It would therefore be necessary to adapt this technique to the global level in consultation with experts. This could perhaps be done in two ways: by authorizing the Special Rapporteur to engage in the relevant consultations or by leaving only the general concept in the text so that a future conference on codification could appoint a committee of experts for that purpose as was done in the case of the law of the sea.

20. Subparagraph (a) defines activities involving risk. Subparagraphs (a) (i) relates them to dangerous substances such as those included in the list and is very general in nature: handling, storage, production and unloading or other similar operations. Carriage was excluded from the draft rules because it was felt that was already covered, in the case of Europe, by existing conventions and drafts. In our case it could be included, because article 4 would give precedence to specific conventions over general ones, without prejudice to the application, in such circumstances, of whatever principles of the framework convention were compatible with those of the specific instrument. With respect to subparagraphs (ii) and (iii), although the term "substances" could be interpreted broadly as "anything used in the activity" or "anything with which the activity is chiefly concerned" and could therefore also encompass "hazardous radiation" or even genetically altered organisms and dangerous micro-organisms, it was deemed preferable to categorize such cases separately in the draft under consideration.

21. New subparagraph (b) defines "dangerous substances", new subparagraph (c), "genetically altered organisms", and new subparagraph (d), "dangerous micro-organisms". These first four subparagraphs would be necessary if the idea of

defining the scope of the draft in a new way is accepted. Existing subparagraph (a), which would become subparagraph (e), would have to be amended. The concept of "risk" is defined specifically in relation to the substances used in an activity, and the new definition of dangerous substances makes that redundant. What might arguably be included is a new subparagraph (e) defining "appreciable" or "significant" risk within the meaning used in the draft, i.e., as that presenting either a higher than normal probability of causing merely "appreciable" or "significant" transboundary harm, or a low or very low probability of causing very considerable or disastrous harm. Here we would be following the draft Code of conduct on accidental pollution of transboundary inland waters of the Economic Commission for Europe (ECE), 24/ in which "risk" is defined as "the combined effect of the probability of occurrence of an undesirable event and its magnitude": in short, old subparagraph (b), minus the concept of "appreciable [significant] risk" as being risk that is easily perceptible, as we said above. Now, the mere fact of handling a dangerous substance makes the risk appreciable, although, of course, one would have to use one's own judgement in determining whether a given risk could cause "transboundary" harm: not every activity involving an explosive substance, for instance, will be liable to cause transboundary harm. An explosives factory situated far from the border, while it might be dangerous for persons living in the vicinity, would not appear to present an "appreciable [significant]" risk of causing transboundary harm. In the next subparagraph - subparagraph (f) - activities with harmful effects can be defined as they were in the former subparagraph (b) but, in response to criticisms of the phrase "throughout the process", the latter could be changed to "in the course of their normal operation". These then are the amendments which would have to be made to the first three articles to bring our draft into line with the approach of determining its scope through a definition of dangerous substances and a list.

C. Other amendments to article 2 and other general provisions

22. The texts proposed below are not related to the foregoing but, rather, are the result of further reflection on the topic and of suggestions made during the most recent debate. First, an attempt has been made to give a more precise definition of the key concept of "transboundary harm" by including the costs of preventive measures taken after an accident has occurred in the case of activities involving risk, or after a harmful effect has arisen in the case of activities with harmful effects, while there is still time to contain or minimize the harm. It seems obvious that if such measures are taken by the affected State in order to protect its territory, or by a third party which is in a position to do so on its behalf, they should be treated as part of the harm and their cost compensated. This is the position taken by a number of recent conventions and drafts. Article 8 (2) of the Convention on the Regulation of Antarctic Mineral Resource Activities of 2 June 1988 stipulates that:

24/ See ENVWA/WP.3/R.1/Rev.1.

"An Operator shall be strictly liable for:

... "(d) reimbursement of reasonable costs by whomsoever incurred relating to necessary response action, including prevention, containment, clean-up and removal measures ..."

Article 8 (1) states that an operator "shall take necessary and timely response action, including prevention, containment, clean-up and removal measures, if the activity results in or threatens to result in damage to the Antarctic environment or dependent or associated ecosystems". 25/ Article 1 (10) of the ECE draft Convention on civil liability for damage caused during carriage of dangerous goods by road, rail and inland navigation vessels 26/ states: "Damage means: ... (d) the costs of preventive measures and further loss or damage caused by preventive measures", while article 1 (11) states: "'Preventive measures' means any reasonable measures taken by any person after an incident has occurred to prevent or minimize damage." The 1981 draft Convention on liability and compensation in connection with the carriage of noxious and hazardous substances by sea of the International Maritime Organization (IMO) 27/ provides, in article 1 (6), that: "Damage includes the costs of preventive measures and further loss or damage caused by preventive measures". Lastly, rule 2 (10) of the Council of Europe draft rules on which we have commented states: "Preventive measures means any reasonable measures taken by any person after an incident has occurred to prevent or minimise damage." Moreover, "the costs of preventive measures and further loss or damage caused by preventive measures" are included in the definition of "damage" in rule 2 (8).

23. A separate category must also be established for harm to the environment, which essentially concerns the State, as opposed to harm caused directly to individuals or their property. Reparation for harm to the environment must be made by restoring the conditions which existed prior to the occurrence of the harm, and the cost of such operations must be borne by the State of origin if they were carried out by the affected State or by a third party at its request. If it is not possible to return to the status quo ante, the monetary value of the impairment suffered should somehow be estimated and the affected State compensated with an equivalent sum, or with such other compensation by the State of origin as is negotiated between the parties concerned. It should be added that if the domestic channel is to be used, the only party entitled to bring proceedings is the affected State. On the other hand, the repercussions of harm to the environment may also be prejudicial to individuals: a hotel owner who loses his customers because the tourist area in which his establishment is located was harmed by a leak of

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25/ "Prevention" shall be construed in these instances as measures intended to limit the effects of an incident which has already occurred.

26/ See document TRANS/R.283.

27/ See IMO document LEG/CONF.6/3.

radioactivity experiences a loss of income for which he must somehow be compensated, and he would be in a position to institute proceedings in the manner which will be described below. This solution is supported by recent practice. It is the solution adopted by the above-mentioned Convention on the Regulation of Antarctic Mineral Resource Activities, article 8 of which makes the operator liable for the "response action" mentioned and article 8 (2) of which states:

> "An Operator shall be strictly liable for:
>
> > "(a) damage to the Antarctic environment or dependent or associated ecosystems arising from its Antarctic mineral resource activities, including payment in the event that there has been no restoration to the status quo ante."

The ECE draft Convention on civil liability for damage caused during carriage of dangerous goods by road, rail and inland navigation vessels 28/ includes within the meaning of damage (art. 1 (10) (c)):

> "loss or damage by contamination to the environment caused by the dangerous goods, provided that a compensation for impairment of the environment other than for loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken."

The Council of Europe draft rules on compensation for damage caused to the environment 29/ state, among the definitions given in rule 2:

> "9. Measures of reinstatement means any appropriate and reasonable measures aiming to reinstate or restore damaged or destroyed natural resources or where appropriate or reasonable to introduce the equivalent of these resources into the environment"

and include the following within the concept of "damage" (rule 2 (8)):

> "loss or damage by contamination of the environment caused by the dangerous substances or waste, provided that compensation for impairment of the environment other than loss of profit shall be limited to costs of measures of reinstatement actually undertaken or to be undertaken."

In such cases, in which it is difficult to assess the harm and the corresponding compensation, the best compensatory measure would logically seem to be the cost of restoring the environment to its status quo ante, and only if this is not possible or not fully possible would monetary or other compensation by the State of origin, to be agreed on with the affected State, be used to restore the balance of interests between the parties which was upset by the harm to the environment.

28/ See footnote 26.

29/ See footnote 4 above.

24. Subparagraph (g) would add to the definition of transboundary harm the idea that it also includes the costs of ex post facto preventive measures, and subparagraph (h) attempts to give a brief definition of "appreciable [significant]" harm. That is no easy task and the Special Rapporteur is open to suggestions in this regard. Rule 3 (4) (d) of the Council of Europe draft rules 30/ excludes "the damage ... caused by pollution at tolerable levels to be anticipated under local (relevant) circumstances" from the liability of the operator. An attempt is also made to define the concept of "incident" in a new subparagraph (k) of rule 2. This raises a question of choice: is it better to use the word "accident" or "incident"? The Diccionario de la Real Academia Española gives as the second meaning of "accident": "suceso eventual o acción de que involuntariamente resulta daño para las personas para las cosas" (fortuitous occurrence or action the involuntary result of which is harm to persons or things). In other words, in order for something to be an accident, it is a condition sine qua non that it be unintentional; indeed, in activities involving risk, the accident would have to be beyond the operator's control, since negligence could imply a violation of the general obligation of due diligence. In activities with harmful effects, while there may be no specific intent to cause harm, it seems clear that the operator is aware of such harm and none the less goes ahead with his activity and thus with the generation of its normal effects, which are by definition harmful. In some of the conventions and drafts we have been looking at in this chapter, there appears to be a preference for the word "incident" in English. While it has something in common with the meaning of the Spanish word "accidente", there are also differences, as is illustrated by the fact that one meaning of "accidente" is: "suceso eventual que altera el orden regular de las casas" (fortuitous occurrence which upsets the normal order of things), and this definition would not be appropriate for activities with harmful effects, in which harm occurs as a consequence of the normal operation of the activity. It might, however, be appropriate to use the term "incidente" in our draft to refer both to an accident in the strict sense, when things are beyond the operator's control, and to a certain effect which "sobreviene en el curso de un asunto o negocio y tiene con éste algún enlace" (arises in the course of a matter or business and is somehow linked to it) - again according to the definition of "incidente" given in the Diccionario de la Real Academia Española. This avoids us getting into the concept of "due diligence": in order for there to be legal consequences, it is enough to know that the effect has arisen. In any event, the Council of Europe draft rules define "incident" as "any sudden or continuous occurrence such as an explosion, fire, leak or emission or any series of occurrences having the same origin, which causes damage or creates a grave and imminent threat of causing damage" (rule 2 (12)). The ECE draft Convention on damage caused during carriage of dangerous goods 31/ defines "incident" as follows: "'Incident' means any occurrence or series of occurrences having the same origin, which causes damage or creates a grave and imminent threat of causing damage". This last might be the most appropriate definition for our draft.

30/ Ibid.

31/ See footnote 26.

25. Subparagraph (1) defines restorative measures and is consistent with the provisions of the conventions and drafts we have already considered, and subparagraph (m) defines preventive measures, including ex post facto preventive measures. Lastly, subparagraph (n) tells us that we will refer to States of origin and affected States as "States concerned". Articles 3, 4 and 5 would remain unchanged.

II. PRINCIPLES

26. The principles would not be affected by the introduction of the concept and the list of dangerous substances. The additions proposed here have to do with the introduction of certain concepts which we took up in considering article 2 under section I.C above.

A. Article 8

27. Article 8 (Prevention) should contain a paragraph incorporating the concept of ex post facto preventive measures, in other words, measures to contain and minimize the harmful transboundary effects of activities. We have chosen to speak of "harmful effects" rather than "harm" in relation to prevention, since a harmful effect may or may not ultimately translate into harm, depending on whether or not certain preventive measures are taken. If measures are taken to reduce or eliminate harm which has already occurred, for instance by attempting to restore the conditions that existed prior to the harm, we are no longer talking about preventive measures, but about reparation.

B. Article 9

28. Article 9 would not be affected, although a new text incorporating comments made in the debate is provided in the footnote, for the benefit of the Drafting Committee.

C. Article 10

29. In order to sound out views in the Commission, an additional principle, that of non-discrimination, is being tentatively proposed and would be incorporated into an article 10. There are two aspects to this principle, and they are formulated separately, in two distinct articles, in the legal principles and recommendations drawn up by the Experts Group on Environmental Law of the World Commission on Environment and Development. 32/ Under the heading "Non-discrimination", article 13 of those norms refers to the obligation of a State of origin "to take

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32/ See footnote 7 above.

into account the detrimental effects which are or may be caused by the environmental interference without discrimination as to whether the effects would occur inside or outside the area under their national jurisdiction". The commentary states:

> "According to this principle States are obliged vis-à-vis other States, when considering under their domestic policy or law the permissibility of environmental interferences or a significant risk thereof, to treat environmental interferences of which the detrimental effects are or may be mainly felt outside the area of their national jurisdiction in the same way as, or at least not less favourably than, those interferences of which the detrimental effects would be felt entirely inside the area under their national jurisdiction."

The commentary considers this to be an "emerging principle" of international environmental law, and the texts it cites to support this thesis include article 30 of the Agreement concerning co-operation between Denmark, Finland, Iceland, Norway and Sweden, article 2 of the Nordic Convention on the Protection of the Environment, 33/ the recommendations of intergovernmental organizations and other bodies, in particular the Organization for Economic Co-operation and Development (OECD) and, above all, Principle 13 of the draft principles of the United Nations Environment Programme (UNEP). 34/ This principle is without prejudice to the fact that a minimum international standard may be required of a State of origin which is higher than that established by its domestic legislation within its own jurisdiction. "Indeed, the principle of non-discrimination was intended to provide a minimum level of protection below which OECD member States were not supposed to come." 35/

30. The other aspect, set forth in article 20 on non-intergovernmental procedures of the same body of norms, applies to individuals, not the State.

> "States shall provide remedies for persons who have been or may be detrimentally affected by a transboundary interference with their use of a transboundary natural resource or by a transboundary environmental interference. In particular, States of origin shall grant those persons equal access as well as due process and equal treatment in the same administrative and judicial proceedings as are available to persons within their own jurisdiction who have been or may be similarly affected."

33/ Ibid., pp. 88-89; see also United Nations, Treaty Series, vol. 1092, No. I-16770.

34/ 1978 Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States (UNEP/IG.12/2, annex to document UNEP/GC.16/17).

35/ See footnote 7 above, p. 90.

The above-mentioned commentary differentiates between the principle contained in the earlier article which we have just discussed, and the one with which we are now dealing, by pointing out that article 13 simply provides that a State of origin may not discriminate between the effects of what is referred to as an "environmental interference" that are felt mainly in its own territory and those felt mainly in another jurisdiction, and does not deal with the legal remedies available to affected or potentially affected aliens (individuals or non-governmental entities). Article 20, on the other hand, establishes that States must provide such remedies for persons who have been or may be detrimentally affected by a "transboundary environmental interference". We shall look at this in more detail, but the foregoing should suffice to justify the inclusion of a principle encompassing both of the first, which it supplements with an appeal to States parties to grant appropriate legal remedies in their legislation and to apply them without discrimination.

III. THE REVISED PROCEDURE

A. Preliminary considerations

31. The Commission felt that the procedure put forward last year in relation to some aspects of co-operation and prevention needed to be simplified and made more flexible. The Special Rapporteur has attempted to do so, in particular by eliminating the period for reply to notification (former articles 13 and 14), simplifying the procedure for protecting national security or industrial secrets (former article 11) and replacing the obligation to negotiate a régime (former article 16) by a simple obligation to hold consultations. It is also clear that failure to comply with the obligations contained in chapter III of the draft does not constitute grounds for the affected State to institute jurisdictional protective proceedings (article 18).

B. Comments on the proposed articles

1. Article 11

(a) Subparagraph (a)

32. We believe that the general duty to assess, notify and inform in the case of certain activities which cause, or create the risk of causing, transboundary harm is reasonably well established in international practice, as the Special Rapporteur attempted to demonstrate in his fifth report. 36/ The cases cited do not, however,

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36/ A/CN.4/423 and Corr.1 and 2, paras. 79-95 and the draft Framework Agreement on Environmental Impact Assessment in a Transboundary Context prepared by the Senior Advisers to ECE Governments on Environmental and Water Problems (ENVWA/AC.3/4).

appear to contain obligations proper, a breach of which would would incur international penalties. The proposed article contains the duty of the State of origin to notify the State or States likely to be affected of any activity referred to in article 1 that is being, or is about to be, carried out under its jurisdiction or control. This would be analogous to former article 10, but if the new definition of the activities referred to in article 1 is adopted (together with the list of dangerous substances in the corresponding annexes), the scope of the article will become rather more restrictive and precise with respect to activities involving risk. The observation made in the most recent debate, to the effect that the State of origin should not be overburdened with these obligations, would then lose some of its weight. In any case, it must be borne in mind that the population of the State of origin is itself generally threatened by the risks or harm presented by activities referred to in article 1 and that the so-called "overburdening" of such States is thus nothing more than a duty which they must or should fulfil towards their own citizens anyway, and that there are, besides, no penalties for non-compliance. As a result, if a State chooses to take responsibility for pursuing an activity which causes, or creates the risk of causing, transboundary harm, without assessing its effects or notifying or informing anyone, it may do so, but it will of course have to pay the corresponding compensation if harm occurs.

(b) Subparagraph (b)

33. This subparagraph envisages situations in which the transboundary effect causing the harm may extend to more than one State, and it establishes the obligation to call in an international organization competent in the area. This plurality of States would create a situation in which the interest goes beyond the bilateral sphere or the sphere of a series of bilateral relations (State of origin with each of the affected States) and becomes, as it were, a public interest. This would also happen if there was more than one affected State and the State of origin had no way of identifying them. Of course, if the activity is governed by a specific convention which provides for an international organization to intervene even when there is only one affected State, the specific convention will prevail.

2. Article 12

34. This article sets forth the functions of the international organization in the cases specified in subparagraph (b) of the preceding article, when those functions are not specified in the organization's own Statutes or rules. Any technical assistance which the organization may provide to developing countries who do not have the necessary technology to assess the transboundary effects of the activity will be very helpful.

3. Article 13

35. If a State has serious reason to believe that an activity in another State is causing it transboundary harm, or creating a risk of causing it such harm, and it warns the alleged State of origin accordingly, the State of origin will have a duty to fulfil the requirements of the preceding article. If the activity in question is indeed one of those referred to in article 1, the State of origin will have to reimburse the costs incurred by the affected State. This seems fair since, by examining the activity in question and giving the State of origin the corresponding information, the affected State has done most of that State's work for it.

4. Article 14

36. In the cases specified in earlier articles, the States concerned will consult among themselves with a view to finding a régime for the activity which reconciles their interests. They will have to do so in good faith and in a spirit of co-operation so as to resolve the matter satisfactorily. If there is more than one affected State, there may be multilateral meetings in addition to any bilateral meetings which may be held by the State of origin. This confers a degree of public status on the matters under discussion which would appear to be beneficial.

5. Article 15

37. This article simplifies the text of former article 11, as suggested in the most recent debate and along the lines of paragraph 78 of the OECD Council resolution; 37/ principle 6 (2) of the Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Exploitation of Natural Resources Shared by Two or More States; 38/ and article 20 of the draft by Professor McCaffrey. 39/

6. Article 16

38. Regardless of the status of discussions - or the state of affairs if there are no discussions - the State of origin that is aware of the potential for transboundary harm by an activity under its jurisdiction or control will have to take the precautionary measures indicated in article 9 - unless, of course, it has reason to believe that the nature of the activity is not what some are claiming. In any case, if, in such circumstances, harm arises that can be attributed causally to the activity the articles relating to the liability of the State of origin will

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37/ See A/CN.4/423 and Corr.1 and 2, para. 85.

38/ Ibid., para. 88.

39/ Official Records of the General Assembly, Forty-third Session, Supplement No. 10 (A/43/10), p. 82.

come into play. 40/ Unilateral preventive measures should include making the suspect activity subject to prior authorization by the State of origin and setting up some form of compulsory insurance, other financial safeguards or a public fund to cover liability towards possible affected States. In ex post facto prevention, it is also possible that the State may have to intervene through public institutions to halt some harmful effect which is spreading but can still be contained or diminished. It may sometimes be necessary to call in the fire brigade or even the army to mobilize forest rangers or to do something else along these lines. And this is an obligation of the State, not the operator.

7. Article 17

39. The usefulness of providing some guidelines for the negotiation of a régime has been stressed on various occasions in the Commission and the Sixth Committee. The transcripts reflect most of the so-called factors described in Section 6 of the Schematic Outline. The Special Rapporteur must confess to a certain lack of enthusiasm for including such concepts in a body of norms, because they are only recommendations or guidelines for conduct and not genuine legal norms, and because the factors involved in this kind of negotiation are too varied to be forced into a narrow conceptual framework. It is not unusual to do so, 41/ however and incorporating them in our articles, apart from lending some substance to the

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40/ For the sake of argument, let us say that the harm is causally attributable to the activity. Strictly speaking, as we explained in the fifth report,

> "... causality originates in specific acts, not activities. A certain result in the physical world which amounts to injury in the legal world can trace the chain of causality back to a specific human act which gave rise to it. It cannot, however, be attributed quite so strictly to an 'activity', which consists of a series of acts, one or more successive episodes of human conduct aimed in a certain direction." (A/CN.4/423 and Corr.1 and 2, para. 13).

41/ See the draft on watercourses; article 7 lists the factors which constitute "equitable and reasonable" utilization of the waters in an international watercourse.

concept of "balance of interests" 42/ which is, so to speak, behind a number of our our texts, and providing guidance to the States concerned, would be of some legal value for assessing the extent to which those States have acted in good faith in the negotiation. It may be useful in this connection to establish whether the State of origin could have conducted an equivalent activity in a less dangerous, although slightly more expensive, way or the extent to which the affected State protects its own nationals from the impact of that or a similar activity. The general paragraph of the article is permissive: the parties may take into account the factors indicated, since doing so would be a matter of free will which can yield only to compulsory norms of international law. Furthermore, so great is the variety of circumstances in each particular case that the States concerned could not be required to take into account the factors included in the article, for some other factor that is not listed may be more relevant in that particular instance. Concerning the list itself, the various subparagraphs are self-explanatory and there is no need for further comment.

8. Article 18

40. If the State of origin fails to comply with the obligations we just discussed, the affected State will be entitled to institute proceedings only if harm arises. The mechanisms of liability are activated only if the harm can be causally attributed to the activity in question. This solution is in line with views expressed in both the Commission and the Sixth Committee, with which there was no disagreement. It is also in line with the international practice mentioned in the

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42/ This expression is very difficult to define. If we generalize, we may find that certain paragraphs of international judgements come close to this idea, such as the following paragraph from the Lake Lanoux case:

> "The Tribunal is of the opinion that, according to the rules of good faith, the upstream State is under the obligation to take into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own." (International Law Reports (1957), p. 139).

There is also the paragraph in the judgement handed down by the Permanent Court of International Justice (PCIJ) in the River Oder case:

> "(a) [this] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others." (Case concerning Territorial Jurisdiction of the International Commission of the River Oder, PCIJ, series A, No. 23 (1929), p. 26).

fifth report of the Special Rapporteur. 43/ Of course, if any proceedings are envisaged in other conventions in force between the parties, those conventions will apply. In any event, if the State of origin fails to comply with the obligations mentioned, it will have no right to invoke the benefits of article 23.

9. Article 19

41. If the State of origin has given the notification required by article 10 and has also voluntarily provided information on the measures it plans to take to prevent harm or minimize risk, and if the affected State or one of the States likely to be affected has not replied, it will be assumed that the measures proposed are satisfactory to the affected State, if harm then occurs, the affected State will not be able to allege that the State of origin did not take sufficient precautions. If the affected State considers the period for replying to notification insufficient or does not have the means to reply on time, it will be able to request an extension. If it is a developing country which needs some assistance in order to make a full assessment of the risks involved, such assistance could be forthcoming from international organizations or from the alleged State of origin itself if that State is able to give it. If a study reveals that the activity is indeed one of those referred to in article 1, the costs of that study will be borne by the State of origin, which is what would have happened if that State complied with its obligations under article 11. Otherwise, the costs will be borne by the affected State.

10. Article 20

42. Article 20 sets limits on the conduct of an activity. It is logical, however, to ban an activity the effects of which cause transboundary harm which cannot be avoided or adequately compensated, as would be the case with some kinds of harm to the environment which are irreversible. In order to be able to pursue the activity, the operator must find a way of converting it into a less harmful one or into one whose effects can be treated, and the State of origin would have to propose this to the operator requesting the corresponding authorization.

43/ A/CN.4/423 and Corr.1 and 2, paras. 79-95.

IV. LIABILITY

A. General considerations

43. This chapter expands on the principle set forth in article 9 and deals with the liability of the State of origin, i.e., the primary obligations which arise from causing the harm. As noted above, liability may be incurred regardless of whether or not the harm is the result of a failure to comply with the obligation of prevention; the consequences may be somewhat different, however, as we shall explain below. In brief, when harm occurs which is causally attributable to an activity referred to in article 1, the State of origin is bound to negotiate the amount of compensation it must pay in order to restore, in so far as possible, the balance of interests which prevailed before the harm. If it does not fulfil this obligation to negotiate, in other words, if it refuses to sit down and talk, or if it proceeds in such a way as to preclude genuine negotiation, 44/ it will be violating an international obligation and thus incurring liability for a wrongful act. Only then, at the end of the entire process, would it incur this type of liability, which enters the realm of secondary rules. Needless to say, if the State of origin agrees, as a result of negotiations, to pay a given amount of compensation and then fails to do so, it also incurs the same liability.

B. Reparation and balance of interests

44. The Special Rapporteur had felt that the chapter on liability, which sets forth the primary obligations of the State of origin when transboundary harm has been caused, might introduce a concept of reparation other than the classical one involved in liability for wrongfulness, i.e., a reparation that did not entail total restitution to eliminate all the consequences of the act which caused the harm. In brief, the idea would be that, using such total reparation as a unit of measurement, certain amounts would be deducted to represent those interests of the State of origin which, before the harm, were not matched by equivalent measures on the part of the affected State. For example, the State of origin might wish to recover amounts spent strictly for the benefit of the affected State, such as those aimed solely at preventing transboundary harm, if such amounts were spent, 45/ or it may want the affected State to help defray the cost of an activity from which the latter also benefits, if that can be demonstrated. Likewise, the State of origin may want the affected State to accept lower compensation in consideration of

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44/ On the obligation to negotiate, see the fifth report of the present Special Rapporteur (A/CN.4/423 and Corr.1 and 2, paras. 126-143 and foot notes).

45/ Costs incurred to prevent harm to the population itself should, however, be deducted from accident-prevention costs, leaving only those additional costs, if any, which are incurred to prevent a transboundary effect; this considerably complicates calculations.

the fact that the same activity is also carried out under the jurisdiction or control of the affected State, in which case compensation would be paid in both directions. Of course, if the affected State does not obtain any benefit from the activity in question, or if the same activity or a similar one is not carried out under its jurisdiction or control, the situation would be different and one would have to think in terms of full compensation.

45. The Special Rapporteur still thinks that would be the ideal situation, as it would allow for distributive justice in the economic aspects of an activity which benefits both States. Several examples may be found in domestic and international law to support this idea: when liability for occupational accidents is objective or strict, there is usually a ceiling which in most cases does not compensate for the harm caused but does allow for rapid payment and may even preserve the viability or economic soundness of the company which has to make payment. To briefly explain the existence of this institution, we might say that ideal justice is sacrificed for the sake of the social utility of manufacturing as such. In international law, some conventions authorize a ceiling on compensation, normally in cases where the harm is of considerable magnitude. This is due, in international law also, to the social utility of the activity and, consequently, to acceptance of the price that must be paid for not interrupting technological progress, although perhaps the most practical reason might be that it is difficult to obtain insurance for the extremely high amounts that are at stake in such activities.

46. In trying to put this idea into practice, however, the Special Rapporteur has come up against some arguments for not adopting it in the framework of a convention as broad as the one with which we are concerned, which envisages all the activities referred to in article 1. Firstly, the most appropriate time to discuss such a solution seems to be during negotiations concerning the régime for a specific activity. It is in the course of negotiations on the terms under which an activity may be pursued in the State of origin that such considerations can best be identified and quantified. This becomes more difficult after harm has occurred.

47. In addition, no matter how attractive such a concept might be, there is no example in international practice of deductions being made in the way suggested above. In many cases, a ceiling is indeed placed on the amount to be paid by the operator; as we said, this was mainly due, at the outset, to the impossibility of obtaining the necessary insurance. This problem has, however, been gradually overcome as ceilings have been raised, firstly as a result of higher amounts of insurance being made available and, secondly, as a result of the establishment of funds either by operators themselves or by member States. One clear example of this is the Brussels Convention 46/ supplementary to the Paris Convention on third party liability in the field of nuclear energy which, in order to provide the greatest possible coverage for damage caused by nuclear activity, raises the

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46/ Convention of 31 January 1963 supplementary to the Paris Convention of 29 July 1960, amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982. Published by OECD, Paris, 1989.

ceiling for compensation (up to 300 million SDRs) with a public fund. Lastly, the Convention on International Liability for Damage Caused by Space Objects, in establishing State liability, provides for full compensation (article 12: "... such reparation in respect of the damage as will restore the person, natural or juridical, State or international organization on whose behalf the claim is presented to the condition which would have existed if the damage had not occurred").

48. Another feature of the articles we are drafting which must be remembered is that they are basically, faute de mieux, of a residual nature. They are aimed primarily at encouraging States to consult with each other in order to try to find legal régimes which cover the specific activity which has given rise to the problem, and to get them to accept the principles set forth therein as a guide for their negotiations. The idea is not to create a perfect system which would operate permanently, but rather to provide a kind of safety net, like those used by acrobats, which would be available if an activity referred to in article 1 were to cause harm without there being any specific legal régime to cover such a case. In these circumstances, it seems best to try to develop a system that works rather than one that guarantees perfect justice. For all these reasons, therefore, we have decided to suggest certain deductions for the situations mentioned above, leaving it up to the affected State to agree to them, should the State of origin so request and should they be reasonable in each case (article 21).

C. Comments on the proposed articles

1. Article 21

49. The obligation to negotiate has already been discussed in connection with this topic several times, as can be seen from one of the earlier footnotes. There is no point in elaborating on it, except for purposes of clarification in this particular context. The obligation of the States concerned consists, in the first place, of sitting down to negotiate; this applies to both States, not just to the State of origin. Both States are also required to conduct their negotiations in good faith, with a view to achieving concrete results, namely, to determining the amount to be paid by the State of origin in order to restore matters either to the situation that existed before the harm occurred (status quo ante) or the situation which most probably would have existed had the harm never occurred (Chorzow factory decision). Of course, put this way, there would not be much to negotiate, and that is why the article is worded somewhat more loosely: it provides that the legal consequences of the harm must be determined and that the harm must, in principle, be fully compensated. It is here that the considerations set forth in article 23 apply, so that, within reasonable limits, a compromise can be reached on (normally) an amount of money that satisfies the interests of both parties. The amount, therefore, would be determined through negotiations, the guidelines for which are given in articles 20 and 23.

2. Article 22

50. If the harm occurs in a situation envisaged in article 11 (b), an international organization may intervene. If an international organization has already been called in as a result of the consultations envisaged in article 14, it may also intervene in this case, at the request of either of the States concerned. Its role will be to co-operate, and to facilitate co-operation on the part of the States concerned in determining the amount to be paid by the State of origin. The international organization will act with the same powers as envisaged in article 12, i.e., in keeping, generally, with the mandates of its own statutes or rules or using its good offices, in order that consensus may be reached as to the amount of compensation to be paid by the State of origin; in any event, it will provide to such States as may request it - presumably developing countries - such technical assistance as may be necessary in order better to ascertain the nature of the harm caused and the best way to make reparation for it. A final paragraph on the possibility of convening joint meetings has not been included because it did not seem necessary; in such cases, when the interests under discussion could be of considerable magnitude and when an international organization is involved, no one is likely to question the right of any of the States concerned or of the international organization involved to call for joint meetings.

3. Article 23

51. As already noted, this article does not include precise definitions either of the harm or of the compensation due from the State of origin; rather, it gives guidelines for negotiations. It would seem reasonable, as stated under section 5 (3) of the Schematic Outline, 47/ to say that:

> "In so far as may be consistent with the preceding articles, an innocent victim should not be left to bear his loss or injury; the costs of adequate protection should be distributed with due regard to the distribution of the benefits of the activity ..."

Hence, if the State of origin can demonstrate that its prevention costs were increased in order to prevent transboundary harm, i.e., that prevention of transboundary harm represented a certain proportion of the costs above and beyond those necessary for internal prevention, it might seem reasonable that this increase in costs should be shared proportionately and equitably with the affected State or States. In other cases, the State of origin could show, although without establishing any exact amounts, that the affected State benefits from the activity in question, e.g., from some of its generally beneficial aspects. It would be impossible to quantify a priori, or even a posteriori, the amounts or proportions involved. All this would be established as a result of negotiations, which then might or might not result in the establishment of a figure that would somehow permit a restoration of the balance of interests at stake. This holds true when a

47/ See Yearbook ... 1982, vol. II (Part I), document A/CN.4/360/para. 53.

claim is made through the diplomatic channel. When a claim is made through the domestic channel, the applicable law would be the national law, in which considerations of this kind rarely prevail, although there may be other considerations such as the limitation of liability to a maximum amount.

4. Article 24

(a) Subparagraph (a)

52. This article concerns harm to the environment. International practice seems to point unequivocally to the solution proposed in our article: various conventions and drafts state that harm to the environment requires that the State of origin restore that environment to its status quo ante and therefore that the affected State, or anyone who carries out the necessary work to restore the environment on behalf of that State, is entitled to reimbursement, provided that the restoration operation is reasonable, in other words that it is within reason and its cost is not manifestly disproportionate to the harm done. If it is impossible to restore fully the environmental conditions existing prior to the harm, the parties must agree on compensation by the State of origin which is deemed equivalent to the deterioration actually suffered. Harm to the environment should be considered separately from harm to persons or private property, or from the State itself, since harm to the environment is more difficult to quantify: it involves harm to things such as air, water and space which cannot be appropriated, which are shared and used by everyone and do not belong to anyone in particular. Environmental harm may also be far more extensive than the other kinds of harms mentioned, however, and the priority is to attempt to restore the conditions that existed prior to the occurrence of the harm. One of the main reasons for the attempt being made, within the International Atomic Energy Agency (IAEA), to amend the Vienna and Paris Conventions on nuclear damage is that the Conventions do not consider harm to the environment over and above harm to persons or property.

(b) Subparagraph (b)

53. Subparagraph (b) by contrast covers precisely that other eventuality: harm to persons (including, or course, death or injury to the health or physical integrity of persons) or to property belonging either to individuals or companies or to the State itself, which is not caused directly (as in article 22) but arises as a consequence of harm to the environment or of impairment of the use or enjoyment of areas under the jurisdiction of the affected State. A typical case would be that of a hotel owner who, as a result of environmental damage to the woodlands of the mountain area in which his hotel is located, is harmed by the loss of his customers. This is a case of a lucrum cessans which must be compensated.

(c) Subparagraph (c)

54. Subparagraph (c) gives the affected State the possibility of agreeing to a reduction in its compensation on the grounds given in article 23. This happens when the diplomatic channel is used, but not when claims are brought by individuals through the domestic channel, in which case, as we have seen, the national law of

the competent court will have to apply. In such circumstances, the compensation may be somewhat different from that which the same individual would have obtained had he resorted, through his State, to the diplomatic channel. The national law may set a limit on liability which affects the share due to each party or there may, in general, be another way of evaluating the harm, etc. This, however, arises from the diversity of national systems and it would be pointless to attempt to unify them under one convention, however multilateral. As we shall see a little further on, our articles impose certain rules on the national law: first, that it give the courts of the country concerned jurisdiction to hear the claims lodged by those persons; secondly, that it provide a remedy that gives prompt and satisfactory compensation in such cases; and thirdly, that there be no discrimination on grounds of nationality, domicile or residence and other basic concepts. It may not be appropriate, however, to impose any further rules on domestic law, as this may give rise to unforeseen complications.

5. Article 25

55. This article covers cases in which there may be more than one State of origin responsible for transboundary harm, and offers two alternatives: under the first alternative, a claim for the entire harm may be brought against any State of origin (joint and several liability) and this State of origin may of course claim from the other State of origin reimbursement of the proportionate share due from that State under article 22. This is the solution adopted by the Convention on International Liability for Damage Caused by Space Objects, and it offers advantages to the affected State, which can recover its losses from any of the States of origin. There are some drawbacks, however: the other Sate may invoke exceptions and, in general, the solution appears more suited to legal proceedings than to a claim through the diplomatic channel. This is where alternative B comes in, also bearing in mind that article 21 provides for a joint procedure under which each State of origin may put forward its procedural position.

6. Article 26

56. The existence of special cases in which there is no liability, or in which liability is not applicable to certain persons in certain circumstances, is common to most of the conventions on liability for harm resulting from specific activities, whether we are talking about civil liability or State liability, even if the liability is absolute or strict. Thus, the Convention on International Liability for Damage Caused by Space Objects, which establishes the liability of the State for such damage, states that exoneration from absolute liability shall be granted "to the extent that a launching State establishes that the damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of the claimant State or of natural or juridical persons it represents". 48/ These are the only grounds for exoneration from liability envisaged in that Convention.

48/ General Assembly resolution 2777 (XXVI), annex, article VI.

57. The other conventions incorporate more grounds for exoneration. They are based on the "channelling" of strict liability towards the operator, who is made solely responsible for the harm. Before proceeding, it should be made clear that the operator's State is liable for any amounts over and above the capacity to pay of the operator or of his insurers and, in that case, fully replaces the operator and appears to be as much the subject of strict liability for those amounts as the operator himself. Article IV (2) of the 1963 Vienna Convention on civil liability for nuclear damage 49/ provides for an exception similar to the one referred to above in cases involving "gross negligence" or an "act or omission ... done with intent to cause damage" on the part of the apparent victim but leaves it up to the court to grant this exception, provided that it is in keeping with the national law. Article IV (3), on the other hand, allows an unrestricted exception in respect of nuclear damage caused by a nuclear incident directly due to (a) "an act of armed conflict, hostilities, civil war or insurrection" or (b) "a grave natural disaster of an exceptional character". Article 9 of the 1960 Paris Convention on third party liability in the field of nuclear energy 50/ establishes an exception for damage caused by a nuclear incident due to "an act of armed conflict, invasion, civil war, insurrection, or a grave natural disaster of an exceptional character", except in so far as national legislation may provide to the contrary. Under article 8 (4) of the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities, an operator shall not be liable if it proves that

> "the damage has been caused directly by, and to the extent that it has been caused directly by:
>
> (a) an event constituting in the circumstances of Antarctica a natural disaster of an exceptional character which could not reasonably have been foreseen; or
>
> (b) armed conflict, should it occur notwithstanding the Antarctic Treaty, or an act of terrorism directed against the activities of the Operator, against which no reasonable precautionary measures could have been effective."

Under article 8 (6), the Convention adds:

> "If an Operator proves that damage has been caused totally or in part by an intentional or grossly negligent act or omission of the party seeking redress, that Operator may be relieved totally or in part from its obligation to pay compensation in respect of the damage suffered by such party".

58. Several important drafts under consideration in various forums also make similar exceptions. Mention has already been made of the draft rules of the European Committee on Legal Co-operation of the Council of Europe, prepared by the

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49/ United Nations, Treaty Series, vol. 1063, No. I-16197.

50/ OECD publication; see also United Nations, Treaty Series, vol. 956, No. I-13706.

Committee of Experts on Compensation for Damage to the Environment. 51/ Rule 3, concerning the liability of the operator, states that the operator shall not be liable: (a) if the damage results solely from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable or irresistible character; or (b) if the damage is caused solely by an act of a third party done with intent to cause damage, despite safety measures appropriate to the type of dangerous activity in question; or (c) the damage was caused solely by an act carried out pursuant to an express order or decisions of a public authority.

59. Article 5 (4) of the ECE draft Convention on civil liability for damage caused during carriage of dangerous goods by road, rail and inland navigation vessels 52/ states that no liability shall attach to the carrier if he proves that:

> "(a) The damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or
>
> (b) The damage was wholly caused by an act or omission done with the intent to cause damage by a third party";

while article 5 (5) states that:

> "If the carrier proves that the damage resulted wholly or partially either from an act or omission done with the intent to cause damage by the person who suffered the damage or from the negligence of that person, the carrier may be exonerated wholly or partially from his liability to such person."

7. Article 27

60. It is also common to set a time-limit after which proceedings in respect of liability lapse. The conventions cited as the basis for the preceding article may also be invoked here. Article X of the Convention on International Liability for Damage Caused by Space Objects establishes time-limits as follows:

> "1. A claim for compensation for damage may be presented to a launching State not later than one year following the date of the occurrence of the damage or the identification of the launching State which is liable.
>
> "2. If, however, a State does not know of the occurrence of the damage or has not been able to identify the launching State which is liable, it may present a claim within one year following the date on which it learned of the aforementioned facts; however, this period shall in no event exceed one year following the date on which the State could reasonably be expected to have learned of the facts through the exercise of due diligence."

51/ See note 4 above.

52/ See document TRANS/R.283.

61. Article VI of the 1963 Vienna Convention on civil liability for nuclear damage establishes a time-limit of 10 years from the date of the nuclear incident which caused the damage, as does the 1960 Paris Convention. Rule 6 of the Council of Europe draft rules establishes a time-limit of three or five years (still to be decided) from the date on which the affected party learned or could reasonably be expected to have learned of the damage and of the identity of the operator. In no event can proceedings be brought once 30 years have elapsed since the date of the accident. Article 18 of the ECE draft Convention on civil liability for damage caused during carriage of dangerous goods by road, rail and inland navigation vessels sets a time-limit of three years from the date at which the person suffering the damage knew or ought reasonably to have known of the damage and of the identity of the carrier.

V. CIVIL LIABILITY

A. General considerations

62. Until now, we had approached the liability envisaged in these articles as an exclusive responsibility of the State, for reasons which were given at the appropriate time 53/ and which, briefly, were: (a) that "although private-law remedies were useful in giving various choices to the parties, they failed to guarantee prompt and effective compensation to innocent victims who, after suffering serious injury, had to take proceedings against foreign entities in the courts of other States"; and (b) that "private-law remedies by themselves would not encourage States to take more effective preventive measures in relation to activities conducted within their territory which gave rise to injurious transboundary consequences". Without discarding these arguments, we should consider the possibility that our articles might make this local remedy more accessible and thus easier to choose for victims who, for whatever reason, prefer it to the protection of their own State. Of course there is nothing, at present, to prevent an individual who has been the victim of transboundary harm from trying to go directly to the courts of the State of origin to obtain compensation for such injury, without seeking protection from his own State which, moreover, may or may not be forthcoming. The affected State itself might in some cases even find it useful to resort to this remedy in order to defend its own interests. Our articles therefore would simply attempt to ensure a minimum degree of uniformity in the treatment of these private individuals or the affected State by the courts and any applicable laws, and also some substantive guarantees and due process of law.

53/ See Yearbook ... 1987, vol. I, p. 186, para. 25.

B. Comments on the proposed articles

1. Article 28

63. Different degrees of international regulation of the domestic legal channel can be envisaged. As a minimum, our articles could establish a system based in part on that of the Convention on International Liability for Damage Caused by Space Objects. 54/ One initial provision for ensuring peaceful coexistence of the domestic channel with the international channel would be to establish, as article XI, paragraph 1, of the aforesaid Convention does, that presentation of a diplomatic claim to the State of origin would not require the prior exhaustion of any local legal remedies which might be available to the claimant State or to natural or juridical persons it represents. At the same time, we would have to establish that nothing in the Convention would prevent a State, or natural or juridical persons it might represent, from pursuing a claim in the courts or agencies of the State of origin (article XI, paragraph 2) or indeed in the courts or agencies of the affected State as we suggested in an earlier article. In that case, the affected State would not be able to use the diplomatic channel to present a claim in respect of harm for which compensation is being sought through the domestic channel. The system established by the aforesaid Convention goes no further than this, but the Commission might find it desirable to regulate access to the domestic channel and some other aspects by means of an international convention. The solution provided by the 1972 Convention commented on above is understandable in an instrument of that kind, in the drafting of which strategic and security considerations prevailed over other considerations, especially economic considerations, in relation to an activity which at the time was seen as the exclusive responsibility of States. 55/

54/ See footnote 9 to paragraph 6 above.

55/ "When in 1966 upon primary agreement of the two superpowers the Outer Space Treaty was adopted, it was within the political context of the legal régime on outer space agreed on a tight régime of international responsibility of the controlling state not only for activities on its behalf but also for private activities carried out under its authority. The stipulation of liability of the controlling state corroborates its obligation to continuously supervise and control governmental, as well as private, space enterprises. It has to be seen in the framework of the space régime and not as a mere technical question of how to adjust the economic risk involved in space activities." Thomas Gehring and Gunther Doeker, Private or International Liability for Transnational Environmental Damage: The Precedent of Conventional Liability Régimes, p. 17.

2. Article 29

(a) Subparagraph (a)

64. A greater degree of regulation of civil liability could be achieved by imposing certain obligations on the parties, beginning with the obligation in subparagraph (a) to grant victims of transboundary harm caused by activities under a party's jurisdiction or control unrestricted access to that party's courts. Such a result would have to be obtained through the party's domestic legislation in order for its courts to have the necessary jurisdiction to deal with claims submitted by individuals or legal entities living or residing in another country. This is the solution advised in the ECE draft code of conduct on accidental pollution of transboundary inland waters, 56/ article 9.3 of which reads: "Countries should endeavour, in accordance with their legal systems and, where appropriate, on the basis of mutual agreements, to provide physical and legal persons in other countries who have been or may be adversely affected by accidental pollution of transboundary inland waters with equivalent access to and treatment in the same administrative and judicial proceedings, and make available to them the same remedies as are available to persons within their own jurisdiction who have been or may be similarly affected". A similar provision is to be found in article 19, paragraph 3, of the draft Convention on civil liability for damage caused during carriage of dangerous goods by road, rail and inland navigation vessels (CRTD). 57/

(b) Subparagraph (b)

65. Subparagraph (b) reflects a greater degree of regulation because, even if they had access to the courts of the State of origin, victims of transboundary harm would still be completely dependent on the solution provided by the national law of the competent court in all areas not regulated by our articles. Domestic law may not grant any remedies even to nationals of the country in the event of such harm, or may grant remedies which fall short of the "prompt and adequate compensation" referred to in subparagraph (b). As we see it, this does not mean that the liability of the party which caused the harm need necessarily be causal or strict - although many international conventions and domestic legal systems envisage this kind of liability for the operator in the case of activities such as those referred to in article 1 - and the formula is sufficiently flexible to permit the application of a domestic law which might reasonably satisfy the claimant. If the applicable law does not recognize no-fault liability, the claimant will have to prove the existence of the conditions stipulated by the local law in order for his claim to be admitted. A precedent for this solution is to be found in article 235, paragraph 235, paragraph 2, of the United Nations Convention on the Law of the Sea: "States shall ensure that recourse is available in accordance with their

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56/ ENVWA/WP.3/R.11/Rev.1.

57/ See Trans/R.283.

legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction".

(c) Subparagraph (c)

66. Subparagraph (c), if acceptable, would give victims of transboundary harm an important option by enabling them to choose between the competent court of the State of origin and that of the affected State. It has been argued that the court of the State of origin is more appropriate since that is where the causal chain leading to the harm originated and, therefore, where evidence can more easily be gathered. That is true, but let us remember that one of the objections raised against the domestic channel was that the victim had to take proceedings in a foreign country, with all the attendent drawbacks: ignorance of substantive law and legal procedures, travel costs, possibly a different language, etc. Under subparagraph (c), the claimant could, if he prefers, lodge a claim with a court in his own country. Evidence can be gathered by sending letters rogatory to the judge of the place where the incident which caused the harm occurred, but the important thing is that the claimant can institute proceedings in his own country. Such a solution is provided for in the Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters 58/ and in the 30 November 1986 decision of the Court of Justice of the European Communities. 59/ Article 19 of the draft Convention on civil liability for damage caused during carriage of dangerous goods by road, rail or inland navigation vessels (CRTD) also establishes the jurisdiction of courts of contracting States: (a) where the damage was sustained; (b) where the incident occurred; (c) where measures were taken to prevent or minimize damage; (d) where the carrier has his habitual residence. 60/ If the affected States wished to go to court to pursue a claim for its own interests (for instance, for damage to its environment), it would have to do so in the courts of the State of origin, not in its own courts, in order to avoid any suspicion of partiality and because the State has means of litigation which are not available to individuals. In any case, this is a progressive provision and might not be acceptable in a global instrument such as ours.

3. Article 30

67. Article 30 provides for the application of the national law in all matters not specifically regulated by our articles. Both the national law and these articles will have to be applied in such a way as to comply with the principle of

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58/ International Legal Materials, vol. 8, p. 229 (1969).

59/ Ibid.

60/ Doc. cit., p. 16.

non-discrimination provided for in draft article 10. The basis for this is to be found in articles 13 and 14 of the Paris Convention on third party liability in the field of nuclear energy.

4. Article 31

68. Article 31, which prevents a State against which proceedings have been instituted under these articles from claiming immunity from jurisdiction, save in respect of enforcement measures, has precedents in article 13 (e) of the Paris Convention and article XIV of the Vienna Convention on civil liability for nuclear damage and would appear necessary for the functioning of the system provided for in our articles.

5. Article 32

69. Article 32 deals with the enforceability of the judgement and is based on article 13 (d) of the Paris Convention on third party liability in the field of nuclear energy, article XII of the Vienna Convention on civil liability for nuclear damage and article 20 of the draft Convention on civil liability for damage caused during carriage of dangerous goods by road, rail or inland navigation vessels. In any global convention such as the one we have here, we would have to allow for the fact that different countries have different conceptions of public policy, as well as the other possibilities listed in the article.

6. Article 33

70. Article 33 (remittances) is self-explanatory and is designed to facilitate the operation of the preceding provisions among parties to the Convention.

Annex

GENERAL LIST OF ARTICLES

The following is a list of the articles proposed so far. The original first 10 articles were reduced to nine when the Commission unanimously agreed to delete article 8 referring to participation. The text of those articles as proposed in the fifth report is given, save where the necessary changes are proposed in order to bring them into line with the possible new definition of the scope of activities involving risk. Further additions to the first nine articles, based on further reflection and the latest debate, are also given. The Drafting Committee will also have before it the original text of the first 10 articles as they appeared in the fourth report. 61/

CHAPTER I

GENERAL PROVISIONS

Article 1

Scope of the present articles 62/

The present articles shall apply with respect to activities carried out in the territory of a State or in other places under its jurisdiction as recognized by international law or, in the absence of such jurisdiction, under its control, when the physical consequences of such activities cause, or create a risk of causing, transboundary harm throughout the process.

61/ A/CN.4/413, para. 17.

62/ This article has been subject to considerable drafting changes, as is evident from the debate at the Commission's forty-first session. One possible text for use by the Drafting Committee might be the following:

> "The present articles shall apply with respect to activities carried out under the jurisdiction or [effective] control of a State and that causes, or create a risk of causing, transboundary harm."

There is no need to qualify the risk and the harm as "appreciable" or "significant" since, as article 2 makes clear wherever the terms "risk" and "harm" are used, they are understood to be "appreciable" or "significant".

Article 2

Use of terms

For the purposes of the present articles:

(a) "Activities involving risk" means the activities referred to in article 1, including those carried out directly by the State, which:

(i) Involve the handling, storage, production, carriage, unloading or other similar operation of one or more dangerous substances;

(ii) Use technologies that produce hazardous radiation; or

(iii) Introduce into the environment dangerous genetically altered organisms and dangerous micro-organisms;

(b) "Dangerous substances" means substances that present a[n appreciable] [significant] risk of harm to persons, property, [the use or enjoyment of areas] or the environment, for example, flammable and corrosive materials, explosives, oxidizants, irritants, carcinogens, mutagens and toxic, ecotoxic and radiogenic substances such as those indicated in the annex .... A substance may be considered dangerous only if it occurs in certain quantities or concentrations, or in relation to certain risks or situations in which it may occur, without prejudice to the provisions of the preceding paragraph;

(c) "Dangerous genetically altered organisms" means organisms whose genetic material has been altered in a manner that does not occur naturally, by coupling or natural recombination, creating a risk to persons, property [, the use or enjoyment of areas] or the environment, such as those indicated in the annex ...;

(d) "Dangerous micro-organisms" means micro-organisms that create a risk to persons, property [, the use or enjoyment of areas] or the environment, such as pathogens or organisms that produce toxins;

(e) "[Appreciable] [Significant] risk" means risk which presents either the low probability of causing very considerable [disastrous] harm or the higher than normal probability of causing minor, though [appreciable] [significant], transboundary harm; 63/

(f) "Activities with harmful effects" means the activities referred to in article 1 which cause transboundary harm in the course of their normal operation;

63/ This subparagraph had to be changed because activities involving risk are now defined in subparagraph (a) of this same article, as a result of the new way of defining the scope of the draft articles in respect of dangerous activities and activities involving risk. The definition of "activities with harmful effects" is now given separately, in subparagraph (f).

(g) "Transboundary harm" means the harm which arises as a physical consequence of the activities referred to in article 1 and which, in the territory or in [places] [areas] under the jurisdiction or control of another State, is [appreciably] [significantly] detrimental to persons, [objects] [property] [, the use or enjoyment of areas] or the environment. In these articles, the term always refers to [appreciable] [significant] harm. It includes the cost of preventive measures taken to contain or minimize the harmful transboundary effects of an activity referred to in article 1, as well as any further harm to which such measures may give rise; 64/

(h) "[Appreciable] [Significant] harm" means harm which is greater than the mere nuisance or insignificant harm which is normally tolerated;

(i) "State of origin" means the State which exercises jurisdiction or control over the activity referred to in article 1;

(j) "Affected State" means the State under whose jurisdiction or control the transboundary harm arises;

(k) "Incident" means any sudden event or continuous process, or series of events having the same origin, which causes, or creates the risk of causing, transboundary harm;

(l) "Restorative measures" means appropriate and reasonable measures to restore or replace the natural resources that have been damaged or destroyed;

(m) "Preventive measures" means the measures referred to in article 8 and includes both measures to prevent the occurrence of an incident or harm and measures which attempt to contain or minimize the harmful effects of an incident once it has occurred;

(n) "States concerned" means the State or States of origin and the affected State or States.

64/ The following might be an appropriate text:

"Transboundary harm" means the harm which arises in areas under the jurisdiction or control of a State as a physical consequence of an activity referred to in article 1. The term always refers to [appreciable] [significant] harm caused to persons, [objects] [property] [, the use or enjoyment of areas] or the environment, and includes the cost of preventive measures taken to contain or minimize the harmful transboundary effects of an activity referred to in article 1, as well as any further harm to which such measures may give rise."

Article 3

Assignment of obligations 65/

The State of origin shall have the obligations established by the present articles, provided that it knew or had means of knowing that an activity referred to in article 1 was being, or was about to be, carried out in its territory or in other places under its jurisdiction or control.

Unless there is evidence to the contrary, it shall be presumed that the State of origin has the knowledge or the means of knowing referred to in the preceding paragraph.

Article 4

Relationship between the present articles and other international agreements

Where States parties to the present articles are also parties to another international agreement concerning activities referred to in article 1, in relations between such States the present articles shall apply, subject to that other international agreement.

Article 5 66/

Absence of effect upon other rules of international law

The present articles are without prejudice to the operation of any other rule of international law establishing liability for transboundary harm resulting from a wrongful act.

65/ The heading gave rise to objections. In Spanish it could be "responsabilidad", because the obligations to which it refers arise as a consequence of "responsabilidad" in both meanings of the word: responsibility for seeing to it that an incident does not occur (prevention) and liability in the event that the incident does occur (compensation by the State of origin).

66/ The second of the two texts proposed in the fifth report was adopted because it appeared more to the point.

CHAPTER II

PRINCIPLES

Article 6

Freedom of action and the limits thereto

The sovereign freedom of States to carry out or permit human activities in their territory or in other places under their jurisdiction or control must be compatible with the protection of the rights emanating from the sovereignty of other States. 67/

Article 7

Co-operation

States shall co-operate in good faith among themselves, and request the assistance of any international organizations that might be able to help them, in trying to prevent any activities referred to in article 1, carried out in their territory or in other places under their jurisdiction or control, from causing transboundary harm. If such harm occurs, the State of origin shall co-operate with the affected State in minimizing its effects. In the event of harm caused by an accident, the affected State shall, if possible, also co-operate with the State of origin with regard to any harmful effects which may have arisen in the territory of the State of origin or in other places [areas] under its jurisdiction or control. 68/

67/ One possibility might be:

"The sovereign freedom of States to carry out or permit human activities [in their territory] or under their jurisdiction or control must be compatible with the rights emanating from the sovereignty of other States."

The term "in their territory" could be deleted since all activities within the territory of a State are under its jurisdiction.

68/ One possibility might be:

"States shall co-operate in good faith among themselves, and request the assistance of any international organizations that might be able to help them, in trying to prevent any activities carried out under their jurisdiction or control from causing transboundary harm. Where possible and reasonable, the affected State shall also co-operate with the State of origin with regard to any harmful effects which have arisen in areas under the jurisdiction or control of the State of origin."

Article 8

Prevention

States of origin shall take appropriate measures to prevent or minimize the risk of transboundary harm or, where necessary, to contain or minimize the harmful transboundary effects of such activities. To that end they shall, in so far as they are able, use the best practicable, available means with regard to activities referred to in article 1. 69/

Article 9 70/

Reparation

To the extent compatible with the present artricles, the State of origin shall make reparation for appreciable harm caused by an activity referred to in article 1. Such reparation shall be decided by negotiation between the State of origin and the affected State or States and shall be guided, in principle, by the criteria set forth in these articles, bearing in mind in particular that reparation should seek to restore the balance of interests affected by the harm.

Article 10 71/

Non-discrimination

States parties shall treat the effects of an activity that arise in the territory or under the jurisdiction or control of another State in the same way as effects arising in their own territory. In particular, they shall apply the

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69/ A better alternative might be as follows:

"States of origin shall take all appropriate measures to ensure that activities under their jurisdiction or control do not cause transboundary harm, to minimize the risk of their causing such harm or, where appropriate, to contain and minimize the harmful transboundary effects of such activities."

70/ We would suggest the heading "Compensation by the State of origin", with the following text:

"To the extent compatible with the present articles, the State of origin shall ensure that [compensation] [reparation] is made for harm caused by an activity referred to in article 1. Such compensation shall be decided between the parties concerned by negotiations, which shall be guided, in principle, by the criteria set forth in these articles."

71/ It has the same number as the article on participation which was deleted.

provisions of these articles and of their national laws without discrimination on grounds of the nationality, domicile or residence of persons injured by the activities referred to in article 1.

CHAPTER III

PREVENTION

Article 11

Assessment, notification and information

(a) If a State has reason to believe that an activity referred to in article 1 is being, or is about to be, carried out under its jurisdiction or control, it shall review that activity to assess its potential transboundary effects and, if it finds that the activity may cause, or create the risk of causing, transboundary harm, it shall notify the State or States likely to be affected as soon as possible, providing them with available technical information in support of its finding. It may also inform them of the measures which it is attempting to take to prevent or minimize the risk of transboundary harm.

(b) If the transboundary effect may extend to more than one State, or if the State of origin is unable to determine precisely which States will be affected as a result of the activity, an international organization with competence in that area shall also be notified, on the terms stated in the preceding paragraph.

Article 12

Participation by the international organization

Any international organization that intervenes shall participate in the manner stipulated in the relevant provisions of its statutes or rules, if the matter is regulated therein. If it is not, the organization shall use its good offices to foster co-operation between the parties, arrange joint or separate meetings with the State of origin and the affected States and respond to any requests which the parties may make to it to facilitate a solution of the issues that may arise. If it is in a position to do so, it shall provide technical assistance to any State that requests such assistance in relation to the matter which prompted its intervention.

Article 13

Initiative by the presumed affected State

If a State has serious reason to believe that an activity under the jurisdiction or control of another State is causing it harm within the meaning of article 2, subparagraph (c), or creating a [appreciable] [significant] risk of causing it such harm, it may ask that State to comply with the provisions of the preceding article. The request shall be accompanied by a technical, documented explanation setting forth the reasons for such belief. If the activity is indeed found to be one of those referred to in article 1, the State of origin shall bear the costs incurred by the affected State.

Article 14

Consultations

The States concerned shall consult among themselves, in good faith and in a spirit of co-operation, in an attempt to establish a régime for the activity in question that takes into account the interests of all parties. At the initiative of any of these States, consultations may be held by means of joint meetings among all the States concerned.

Article 15

Protection of national security or industrial secrets

The State of origin shall not be bound by the provisions of article 11 to provide data and information that are vital to its national security or to the protection of its industrial secrets. Nevertheless, the State of origin shall co-operate in good faith with the other States concerned in providing any information that it is able to provide, depending on the circumstances.

Article 16

Unilateral preventive measures

If the activity in question proves to be an activity referred to in article 1, and until such time as agreement is reached on a legal régime for that activity among the States concerned, the State of origin shall take appropriate preventive measures as indicated in article 8, in particular, appropriate legislative and administrative measures including: requiring prior authorization for the conduct of the activity and encouraging the adoption of compulsory insurance or other financial safeguards to cover transboundary harm, as well as the application of the best available technology to ensure that the activity is conducted safely. If necessary, it shall take government action to counteract the effects of an incident that has already occurred and that presents an imminent and grave risk of causing transboundary harm.

Article 17

Balance of interests

In order to achieve an equitable balance of interests among the States concerned in relation to an activity referred to in article 1, these States may, in their consultations or negotiations, take into account the following factors:

(a) Degree of probability of transboundary harm and its possible gravity and extent, and likely incidence of cumulative effects of the activity in the affected States;

(b) The existence of means of preventing such harm, taking into account the highest technical standards for engaging in the activity;

(c) Possibility of carrying out the activity in other places or with other means, or availability of other alternative activities;

(d) Importance of the activity for the State of origin, taking into account economic, social, safety, health and other similar factors;

(e) Economic viability of the activity in relation to possible means of prevention;

(f) Physical and technological possibilities of the State of origin in relation to its capacity to take preventive measures, to restore pre-existing environmental conditions, to compensate for the harm caused or to undertake alternative activities;

(g) Standards of protection which the affected State applies to the same or comparable activities, and standards applied in regional or international practice;

(h) Benefits which the State of origin or the affected State derive from the activity;

(i) Extent to which the harmful effects stem from a natural resource or affect the use of a shared resource;

(j) Willingness of the affected State to contribute to the costs of prevention or reparation of the harm;

(k) Extent to which the interests of the State of origin and the affected States are compatible with the general interests of the community as a whole;

(l) Extent to which assistance from international organizations is available to the State of origin;

(m) Applicability of relevant principles and norms of international law.

Article 18

Failure to comply with the foregoing obligations

Failure on the part of the State of origin to comply with the foregoing obligations shall not constitute grounds for affected States to institute proceedings, unless this is provided for in other international agreements in effect between the parties. If, in these circumstances, the activity causes [appreciable] [significant] transboundary harm which can be causally attributed to it, the State of origin may not invoke in its favour the provisions of article 23.

Article 19

Absence of reply to the notification under article 11

In the cases referred to in article 11, if the notifying State has provided information concerning the measures referred to therein, any State that does not reply to the notification within a period of six months shall be presumed to consider the measures satisfactory; this period may be extended, at the request of the State concerned, [for a reasonable period] [for a further six months]. States likely to be affected may ask for advice from any international organization that is able to give it.

Article 20

Prohibition of the activity

If an assessment of the activity shows that transboundary harm cannot be avoided or cannot be adequately compensated, the State of origin shall refuse authorization for the activity unless the operator proposes less harmful alternatives.

CHAPTER IV

LIABILITY

Article 21

Obligation to negotiate

If transboundary harm arises as a consequence of an activity referred to in article 1, the State or States of origin shall be bound to negotiate with the affected State or States to determine the legal consequences of the harm, bearing in mind that the harm must, in principle, be fully compensated.

Article 22

Plurality of affected States

Where more than one State is affected, an international organization with competence in that area may intervene, if requested to do so by any of the States concerned, for the sole purpose of assisting the parties and fostering their co-operation. If the consultations referred to in article 14 have been held and if an international organization has participated in them, that same organization shall also participate in the present instance, if the harm occurs before agreement has been reached on a régime for the activity that caused the harm.

Article 23

Reduction of compensation payable by the State of origin

For claims made through the diplomatic channels, the affected State may agree, if that is reasonable, to a reduction in the payments for which the State of origin is liable if, owing to the nature of the activity and the circumstances of the case, it appears equitable to share certain costs among the States concerned [for example, if the State of origin has taken precautionary measures solely for the purpose of preventing transboundary harm and the activity is being carried out in both States, or if the State of origin can demonstrate that the affected State is benefiting without charge from the activity that caused the harm].

Article 24

Harm to the environment and resulting harm to persons or property

If the transboundry harm proves detrimental to the environment of the affected State:

(a) The State of origin shall bear the costs of any reasonable operation to restore, as far as possible, the conditions that existed prior to the occurrence of the harm. If it is impossible to restore these conditions in full, agreement may be reached on compensation, monetary or otherwise, by the State of origin for the deterioration suffered;

(b) If, as a consequence of the harm to the environment referred to in the preceding subparagraph, there is also harm to persons or property in the affected State, payments by the State of origin shall also include compensation for such harm;

(c) In the cases referred to in subparagraphs (a) and (b) above, the provisions of article 23 may apply, provided that the claim is made through the diplomatic channel. In the case of claims brought through the domestic channel, the national law shall apply.

Article 25

Plurality of States of origin

In the cases referred to in the two preceding articles, if there is more than one State of origin,

Alternative A. [They shall be jointly and severally liable for the resulting harm, without prejudice to any claims which they may bring among themselves for their proportionate share of liability.]

Alternative B. [They shall be liable vis-à-vis the affected State in proportion to the harm which each one of them caused.]

Article 26

Exceptions

There shall be no liability on the part of the State of origin or the operator, as the case may be:

1. (a) If the harm was directly due to an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

(b) If the harm was caused wholly by an act or omission of a third party done with intent to cause harm.

2. If the State of origin or the operator, as the case may be, prove that the harm resulted wholly or partially either from an act or omission done with intent to cause harm by the person who suffered the harm or from the negligence of that person, in which case they may be exonerated wholly or partially from their liability to such person.

Article 27

Limitation

Proceedings in respect of liability under these articles shall lapse after a period of [three] [five] years from the date on which the affected party learned, or could reasonably be expected to have learned, of the harm and of the identity of the State of origin or the operator, as the case may be. In no event, shall proceedings be instituted once 30 years have elapsed since the date of the accident that caused the harm. If the accident consisted of a series of occurrences, the 30 years shall start from the date of the last occurrence.

CHAPTER V

CIVIL LIABILITY

Article 28

Domestic channel

(a) It is not necessary for all local legal remedies available to the affected State or to individuals or legal entities represented by that State to be exhausted prior to submitting a claim under the present articles to the State of origin for liability in the event of transboundary harm.

(b) There is nothing in these articles to prevent a State, or any individual or legal entity represented by that State and that considers it has been injured as a consequence of an activity referred to in article 1, from submitting a claim to the courts of the State of origin [and in the case of article 29, subparagraph (d), of the affected State]. In that case, however, the affected State may not use the diplomatic channel to claim for the same harm for which such claim has been made.

Article 29

Jurisdiction of national courts

(a) The parties shall, through their national legislation, give their courts jurisdiction to deal with the claims referred to in the preceding article, and shall also give affected States or individuals or legal entities access to their courts.

(b) States parties to these articles shall make provision, in their domestic legal systems, for remedies that permit prompt and adequate compensation or other reparation of transboundary harm caused by activities referred to in article 1 carried out under their jurisdiction or control.

(c) Except for the affected State, the other persons referred to in the preceding article who consider that they have been injured may elect to institute proceedings either in the courts of the affected State or in those of the State of origin.

Article 30

Application of national law

The court shall apply its national law in all matters of substance or procedure not specifically regulated by these articles. These articles and also the national law and legislation shall be applied without any discrimination whatsoever based on nationality, domicile or residence.

Article 31

Immunity from jurisdiction

States may not claim immunity from jurisdiction under national legislation or international law in respect of proceedings instituted under the preceding articles, save in respect of enforcement measures.

Article 32

Enforceability of the judgement

1. When a final judgement made by the competent court is enforceable under the laws applied by that court, it shall be recognized in the territory of any other Contracting Party, unless:

(a) The judgement has been obtained fraudulently;

(b) The respondent has not been given reasonable advance notice and an opportunity to present his case in fair conditions;

(c) The judgement is contrary to the public policy of the State in which recognition is being sought, or is not in keeping with the basic norms of justice.

2. A judgement which is recognized to be in accordance with the preceding paragraph shall be enforceable in any of the States parties as soon as the formalities required by the Contracting Party in which enforcement is being sought have been met. No further review of the substance of the matter shall be permitted.

Article 33

Remittances

States parties shall take the steps necessary to ensure that any monies due to the Applicant in connection with proceedings in their courts arising from the preceding articles, and any monies he may receive in respect of insurance or reinsurance or other funds designed to cover such harm, may be freely remitted to the Applicant in the currency of the affected State or in that of the State of his habitual residence.

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DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

Report of the Secretary-General

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INTRODUCTION

1. In its resolutions 43/164 of 9 December 1988 and 44/32 of 4 December 1989, entitled "Draft Code of Crimes against the Peace and Security of Mankind", the General Assembly, inter alia, invited the International Law Commission to continue its work on the elaboration of the draft Code of Crimes against the Peace and Security of Mankind and requested the Secretary-General to continue to seek the views of Member States regarding the conclusions contained in paragraph 69 (c) (i) of the Commission's report on the work of its thirty-fifth session. 1/

2. In implementation of the above-mentioned resolutions, the Secretary-General by notes dated 28 February 1989 and 15 February 1990, respectively, requested the views of Member States on the conclusions referred to above.

3. The replies received pursuant to resolution 43/164 were reproduced in a report submitted by the Secretary-General to the General Assembly at its forty-fourth session in document A/44/465.

4. After that document had been issued the Secretary-General received an additional reply, which will be included in the relevant report to be submitted by him to the General Assembly at its forty-fifth session, the text of which is reproduced below.

5. Any further replies received by the Secretary-General by the end of the Commission's session will be reproduced in addenda to this document.

I. REPLIES RECEIVED FROM GOVERNMENTS

MALI

[Original: French]

[15 February 1990]

Following the First World War, mankind felt the need to draw up an international criminal code and to set up an international criminal jurisdiction, but the will to do so could not be translated into reality at that time; the goals

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1/ Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 10 (A/38/10). Paragraph 69 (c) (i) reads as follows:

"(c) With regard to the implementation of the Code:

(i) Since some members consider that a code unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective, the Commission asks the General Assembly to indicate whether the Commission's mandate extends to the preparation of the statute of a competent international criminal jurisdiction for individuals".

in question could not be attained until after the Second World War, when for the first time in history war criminals were put on trial, at Nürnberg.

The United Nations has made a consistent endeavour to draw up a draft code of crimes against the peace and security of mankind. After many years of suspension, the United Nations General Assembly once again invited the International Law Commission to consider the issue of whether there is an international legal order, namely, whether there are interests whose protection is not the concern of individual nations but, of all mankind.

Environmental pollution problems (for example, destruction of the ozone layer or toxic waste) are a case in point. It is recognized that the environment is a matter of public concern and that it must therefore be given international protection. Likewise, all civilizations must receive equal protection. When it is a question of civilized nations, there is no room for slavery, colonization and domination by one race over another, and for hegemonistic wars, which constitute a negation of peace and security in the world or even crimes against humanity.

The International Law Commission will have to list and define in a code acts whose perpetration would disrupt international peace, thus constituting crimes falling within the competence of an international criminal jurisdiction. However, the purpose of such a codification exercise, highly laudable though it may be, remains somewhat unclear, since no international criminal jurisdiction really exists and, moreover, many perpetrators of international crimes are heads of State or Government who, owing to their position, are beyond the reach of the law in their countries. At present, such political leaders are merely denounced before world public opinion. Since such denunciations are insufficient, sanctions are sometimes applied to their countries, wrongly.

The purpose of setting up an international criminal jurisdiction is to facilitate the prosecution and personal conviction of all perpetrators, whatever position they hold, of crimes against the peace and security of all mankind.

Such a project would inevitably have implications for domestic legislation, which must be brought into line with the measures adopted by the international community in the field of criminal law.

In view of the foregoing, the Government of Mali is of the view that the International Law Commission should proceed with the preparation of a draft statute of an international criminal jurisdiction.

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EIGHTH REPORT ON THE DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

by

Mr. Doudou THIAM, Special Rapporteur

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INTRODUCTION

1. This report consists of two parts.

2. Part I concerns the "related offences" or "other offences" which the Special Rapporteur had occasion to discuss in his fourth report 1/ i.e. complicity, conspiracy (complot), and attempt. This report proposes draft articles on these offences, accompanied by commentaries thereto.

3. Part II of this report was prepared pursuant to the request of the International Law Commission, recorded in paragraph 210 of its report on the work of its forty-first session, 2/ that the Special Rapporteur prepare for the current session a draft provision on international drug trafficking. In the light of the views expressed by several members of the Commission, reflected in paragraphs 205 to 209 of the Commission's report, the Special Rapporteur deemed it necessary to prepare two draft articles, one defining international drug trafficking as a crime against peace and the other defining it as a crime against humanity. The two draft articles are accompanied by commentaries.

1/ See Yearbook of the International Law Commission 1986, vol. II (Part One), p. 53, doc. A/CN.4/398, paras. 89-145.

2/ Official Records of the General Assembly, Forty-fourth Session, Supplement No. 10 (A/44/10).

I. PART ONE - COMPLICITY, CONSPIRACY (COMPLOT) AND ATTEMPT

A. Complicity

1. Draft article 15

4. The Special Rapporteur proposes the following draft article:

> The following constitute a crime against the peace and security of mankind:
>
> 1. Being an accomplice in any of the crimes defined in this Code.
>
> 2. Within the meaning of this Code, complicity may mean both accessory acts prior to or concomitant with the principal offence and subsequent accessory acts.

2. Commentary

(a) Remarks on methodology

5. First, a question of methodology must be resolved. Some members of the Commission maintained that the concept of complicity should be included in the general part of the Code, dealing with general principles, rather than in the part dealing with the crimes themselves. The Special Rapporteur does not agree. It is no doubt axiomatic that the accomplice incurs the same criminal responsibility as the principal. But the affirmation of this principle is one thing, and the definition of the crime of complicity itself is another. Complicity, as a crime, should be included in the part of the Code dealing with the definition of offences.

6. That question having been resolved, the draft article on complicity proposed above will now be examined.

(b) Paragraph 1

(i) Physical and intellectual acts of complicity

7. Acts of complicity can be divided into two categories: physical acts (aiding, abetting, provision of means, gifts, etc.) and acts which are intellectual or moral in character (counsel, instigation, provocation, orders, threats, etc.).

8. Aiding, abetting, and provision of means and gifts are specific physical acts. In the case of acts in this category, it is relatively easy to draw a distinction between the principal - the person who has killed, for example - and the accomplice - the person who aided and abetted the principal or provided him with the means to kill.

9. The problem is more complex in the case of acts of an intellectual character. It is sometimes difficult to determine who is the principal and who the accomplice: the person who inspired, instigated or ordered an act, or the person who actually committed it. In such situations, those who ordered, inspired or instigated the commission of a criminal act have sometimes been considered as "originators" (auteurs intellectuels), sometimes as indirect perpetrators and sometimes as accomplices. On other occasions, those who gave the order and those who executed it have been considered as co-perpetrators. Everything depends on the circumstances of the case and the degree of participation of the persons involved, and also on the legal system.

10. It is for this reason that the laws of some countries provide examples in which superiors are considered the accomplices of their subordinates.

11. Thus, the French Ordinance of 26 August 1944 provides that where a subordinate is prosecuted as the actual perpetrator, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have organized or tolerated the criminal acts committed. A similar approach is taken in the Luxembourg Act of 2 August 1947 (art. 3), the Greek Constitutional Act No. 73 on the punishment of war criminals, and the Chinese Act of 24 October 1956 on the trial of war criminals.

12. The United States Supreme Court, in the Yamashita case, considered that complicity could result from an army commander's breach of his duty to control the operations of the members of his command, leading to serious violations of the laws and customs of war. 3/

13. Along the same lines, one may also cite the judgement of the Tokyo Tribunal, 4/ which extended this complicity to members of the Government and to all officials concerned with the well-being of protected persons. Again, in the Hostages case, a presumption of responsibility was established in the case of corps commanders for acts committed by their subordinates which they "knew or ought to have known about". 5/

14. These examples show that there is no hard and fast distinction between the concepts of principal perpetrator, co-perpetrator and accomplice. The content of these concepts varies from one penal code to another. The difficulty of

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3/ See Law Reports of Trials of War Criminals (15-volume series, prepared by the United Nations War Crimes Commission) (London, H.M. Stationery Office, 1947-1949), vol. IV, p. 43, and United States Reports, Washington (D.C.), 1947, vol. 327, pp. 14-15.

4/ See Law Reports of Trials of War Criminals, ..., vol. XV, pp. 72-73.

5/ See Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 (Nuernberg, October 1946-April 1949) (15-volume series, hereinafter referred to as "American Military Tribunals") (Washington (D.C.), U.S. Government Printing Office, 1949-1953), case No. 7, vol. XI, p. 1303.

establishing precise criteria for distinguishing between accomplices, principal perpetrators, co-perpetrators and so on probably explains why the Charters of the International Military Tribunals referred, in the same articles and without distinction, to "leaders, organizers, instigators and accomplices" (art. 6 (c) of the Charter of the Nürnberg Tribunal and art. 5 (c) of the Charter of the International Military Tribunal for the Far East); 6/ or again, any person who "was an accessory to the commission of a crime or ordered or abetted the same or took a consenting part therein" (art. II, para. 2, of Law No. 10 of the Allied Control Council). The brief references illustrate the scope of the concept of complicity and the variety of its content, which are reflected both in the acts of complicity and their characterization and in the status of those committing such acts.

(ii) Acts of complicity and their characterization

15. Penal codes vary in their approach to the different categories of acts of complicity. Thus, some codes do not qualify counsel as a crime (for example, the French Penal Code). Others, on the other hand, consider that counsel to commit a crime is an act of complicity. Article 22 of the Canadian Criminal Code, for example, defines counsel as the act of procuring, abetting or leading a person to commit an offence.

16. Concerning another aspect of the question, it may be observed that in some legislations negative acts such as abstention or non-intervention are not defined as crimes or are so defined only on very rare occasions (for example, the French Ordinance of 28 October 1944 on the prosecution of war criminals).

17. In other legislations abstention is defined as a crime. This is the case in German law.

18. This diversity is also reflected in the actual characterization of the act of complicity. An act regarded as an act of complicity in one legal system will be considered a separate offence in another system. The typical example is concealment.

19. Sometimes, this characterization has evolved over time within the same system of law. For example, the French Penal Code classified the concept of concealment in one way from 1810 to 1915, but has classified it differently since 1915; concealment was characterized as an act of complicity in the 1810 Napoleonic Code but since 1915 it has been considered an autonomous offence.

20. Generally speaking, when an act of complicity has certain specific features or attains a certain degree of seriousness, there is a tendency to detach it from complicity and make it a separate offence. This rule also applies in international law. Thus, following the judicial precedents set in the Yamashita case and others, article 86 of Additional Protocol I to the 1949 Geneva Conventions defined

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6/ Hereinafter referred to as the "Tokyo Charter"; published in Documents on American Foreign Relations (Princeton University Press), vol. VIII (July 1945-December 1946) (1948), pp. 354 et seq.

complicity by a military commander as an autonomous offence. These successive and diverse characterizations demonstrate the complexity and evolutionary character of the content of the concept of complicity.

(iii) The actors

21. On turning to the actors in the drama, those who play a role in complicity, we again note the existence of grey areas, areas of uncertainty. The observer must steer an uncertain course among the concepts of principal perpetrator, co-perpetrator, direct perpetrator, indirect perpetrator and accomplice.

22. The laws of some countries do not define the perpetrator: for example, the 1810 French Penal Code, the 1871 German Code, the 1889 Finnish Code, the 1902 Norwegian Code, the 1930 Danish Code, the 1930 Italian Code, the 1932 Polish Code, the 1937 Chinese Code, the 1940 Icelandic Code, the 1950 Greek Code, the 1951 Yugoslav Code and the 1954 Greenland Code.

23. Other legislations, on the other hand, do define the perpetrator: these include the 1867 Belgian Code (art. 66), the 1879 Luxembourg Code (art. 66), the 1891 Netherlands Code (art. 47), the 1886 Portuguese Code (art. 20), the 1832 Philippine Code (art. 17), the 1936 Cuban Code (art. 28), the 1951 Egyptian Code (art. 39), the 1944 Spanish Code (art. 14), the 1951 Bulgarian Code (art. 18), the 1957 Ethiopian Code (art. 32), the 1961 Soviet Code (art. 17), the 1961 Hungarian Code (art. 13), and the 1961 Czechoslovak Code (art. 9).

24. This uncertainty regarding definition becomes perplexity if one seeks to assign the actors to one category or another and to determine the precise role played by each. Reduced to its simplest terms, complicity involves two actors: the physical perpetrator of the offence (thief, murderer, etc.), called the principal, and the person who assists the principal (by aiding, abetting, provision of means etc.), who is called the accomplice. But this simple schema does not reflect the complex reality of the phenomenon of complicity in the context of the subject under consideration. As we have just seen, situations arise where it is hard to tell who is the principal and who is the accomplice. In acts of an intellectual or moral character (counsel, incitement, order, abuse of authority), it is not easy to say who is the principal and who is the accomplice. In these situations, the hierarchical relationship which sometimes exists between the actual perpetrator of the act and his superior makes it difficult to conceive of the latter as the accomplice of the former, in so far as the role of the accomplice is acknowledged to be a secondary one. That is the reason why such situations are sometimes separated from complicity and characterized separately. This is the case as regards a military commander who is held responsible for crimes or offences committed by his subordinates, as we have already seen.

25. It should also be noted that the giving of orders and counsel is sometimes difficult to prove when this has not been done in writing. Moreover, those who have given an order are very often not present when it is carried out; sometimes, as in the case of leaders or organizers, they are not even informed of every offence committed in application of the general plan which they drew up, and which guided the conduct of those who committed the offences. This case will be analysed

at greater length in connection with draft article 16, on conspiracy (complot). As regards the offences under discussion here, the traditional moulds are broken. The classic dichotomy of principal and accomplice, which is the simplest schema, is no longer applicable because of the plurality of actors. The dualistic classification gives way to the broader concept of participants, which encompasses both principals and accomplices. It might sometimes be wondered whether all the actors should not be defined as participants without it being necessary to determine the precise role played by each of them.

26. The International Military Tribunals sometimes refused to draw a distinction between principals and accomplices. For example, the Supreme Court of the British Zone considered that the act of complicity and the principal act were both crimes against humanity and that consequently accomplices should be sentenced for having committed a crime against humanity and not for being accomplices in the commission of such a crime. 7/ The acts in question - whether principal acts or accessory acts - are all acts of participation and are not subordinate to each other in any way. They are equivalent as regards responsibility, even if certain subjective considerations, such as intent or degree of awareness, come into play in the imposition of the penalty.

27. At this level of analysis, the distinction between principal act and accessory act disappears completely and the two concepts merge in the more general concept of criminal participation, which encompasses both. The distinction between the concepts of principal and accomplice likewise disappears, and is replaced by the concept of participant, which is applied to all those involved in a crime committed through participation. This is the principle of placing all participants in a crime on an equal footing.

28. In its broadest sense the concept of criminal participation encompasses not only the traditional concept of complicity but also that of conspiracy (complot), and both concepts could have been covered in a single provision under the heading of criminal participation. However, it seemed preferable in the present report to devote separate articles to complicity and conspiracy (complot). It should be remembered, however, that the content of these concepts changes as soon as they are transposed to international law, because of the mass nature of the crimes involved and the plurality of acts and actors (which makes it difficult to define the roles played by the various actors).

29. The complexity of the concept of complicity is also reflected in the links of causality between the act of complicity and the commission of the principal offence. This raises the problem of whether the act of complicity was committed before or after the offence, which is dealt with in paragraph 2 of the present draft article.

7/ Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen (O.G.H. br. Z) (Berlin, 1949), vol. 1, p. 25; (cited in H. Meyrowitz, La répression par les tribunaux allemands des crimes contre l'humanité et de l'appartenance à une organisation criminelle en application de la loi No. 10 du Conseil de contrôle allié (Paris, Librairie générale de droit et de jurisprudence, 1960), p. 373).

(c) Paragraph 2

30. Paragraph 2 concerns the question whether the act of complicity was committed before or after the principal act. Is the concept of complicity limited to acts committed prior to or concomitantly with the principal act? Can it also encompass acts committed after the principal act? Here again the solutions vary according to the legal system.

31. For certain legal systems, acts committed after the principal act constitute autonomous offences, even if they are linked to the principal act. This is the case with concealment of persons or property or non-denunciation of the offence. This method is generally said to be that of the continental legal systems, as opposed to the common law. We do not intend to undertake a comparative law study, but simply to choose here and there examples which illustrate our point. Thus, the Canadian Criminal Code devotes a specific provision to the accessory after the fact. Article 21 of this Code states: "An accessory after the fact is one who, knowing that a person participated in the offence, receives, comforts or assists him for the purpose of enabling him to escape".

32. This "post factum" offence is based on the idea that participation is not limited only to a link to an offence to be committed in the future or in the course of being committed, but may also be linked to an offence already committed. It is therefore not absolutely necessary that there should be a causal relationship between the act of the accomplice and the offence itself.

33. This concept, today too closely linked to the common law, derives from ancient law, which drew a distinction between various phases in the "cursus plurium delictum": "antecedens, concomitans, subsequens". We have seen that as late as 1810, the French Penal Code made concealment an offence of complicity. Not until a later stage was concealment of property defined as a specific crime. And even today, concealment of robbers (art. 61, para. 1) remains a crime of complicity.

34. Today, there are no longer two separate legal systems, one of which limits the definition of complicity to prior or concomitant acts of participation, while the other also includes acts committed later. There is, rather, a diversity of approaches in this domain.

35. Contemporary continental law refers also to acts of complicity committed after the principal offence. Thus, article 22 of the 1975 Penal Code of the German Democratic Republic states: "Any person who provides the perpetrator of an offence, after its commission, with assistance promised beforehand, shall be criminally responsible for that offence". According to French judicial practice, aiding or abetting after the commission of an offence constitutes complicity if it results from a prior agreement. 8/ The Penal Code of the Federal Republic of Germany states in article 257 that "whoever renders assistance to a person who has committed an unlawful act with the intention of securing for him the fruits of that

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8/ Court of Cassation, Criminal Chamber, 30 April 1963, Bulletin Crim. 1963, p. 137.

crime" shall be prosecuted for complicity. Article 258 of the same Code states: "Whoever, acting intentionally or knowingly, obstructs, either altogether or partially, the imposition of criminal punishment on another for an unlawful act" shall be prosecuted. Soviet penal law acknowledges a form of complicity subsequent to the principal offence. According to Igor Andrejew, 9/ this concept is based on the idea of "contact", that is, on a direct link between the subsequent act and the offence committed previously.

36. Turning to international criminal law, it should be recalled that the International Military Tribunals applied this extended concept of criminal participation in their decisions. In the Funk case, the accused, in his capacity as Minister of Economics and President of the Reichsbank, had signed an agreement with the SS, which delivered to the bank the gold and valuables that had belonged to murdered Jews, in particular spectacle frames and false teeth. The Nüremberg Tribunal was of the opinion that there had been express or tacit consent on the part of Funk to acts of concealment of goods improperly acquired subsequent to the death of their owners. The judgement stated in this connection: "Funk has protested that he did not know that the Reichsbank was receiving articles of this kind. The Tribunal is of the opinion that he either knew what was being received or was deliberately closing his eyes to what was being done". 10/

37. These examples prove that we are dealing with a subject-matter which makes any attempt at rigid classification a risky undertaking. It would probably be preferable to simplify in this area, in one way or another.

38. The VII International Congress of Penal Law, held at Athens in 1957, considered that subsequent acts involving the provision of aid, which do not result from a prior agreement, in particular concealment, should be punishable as special offences. 11/

39. It is true that legal writers tend to detach this "post factum" participation from complicity.

40. Despite this tendency, however, it must be acknowledged that in this area penal legislation is not yet uniform and that indeed, as we have seen, great diversity exists. The present report cannot propose a single rule without denying the coexistence of these two tendencies. The Special Rapporteur therefore felt it preferable to propose a draft article which took that coexistence into account. That is the purpose of paragraph 2 of this draft article, which is placed in square brackets.

9/ I. Andrejew, Le droit pénal comparé des pays socialistes, Paris, Pédone, 1981, pp. 61 et seq.

10/ See Trial of the Major War Criminals before the International Military Tribunal (Nuremberg, 14 November 1945-1 October 1946) (official English text, 42 volumes) (Nürnberg, 1947-1949), vol. I, p. 306; cited in Meyrowitz, op. cit. (see footnote 7 above), p. 377.

11/ See Compte-rendu des discussions, Athens, 1961, p. 350.

(d) Conclusion

41. These comments lead to the conclusion that in international criminal law complicity is a very broad concept, not only because of the innumerable quantity and diversity of the acts and actors involved in criminal participation, but also because of the scope of its application in time, which may cover both acts committed before the principal offence and acts committed afterwards. To use the terminology of the theatre, it may be said that, among the crimes under consideration, complicity is a drama of great complexity and intensity.

B. Conspiracy

1. Draft article 16

42. The Special Rapporteur proposes the following draft article:

The following constitute crimes against the peace and security of mankind:

(1) Participation in a common plan or conspiracy to commit any of the crimes defined in this Code.

(2) First alternative

Any crime committed in the execution of the common plan referred to in paragraph (1) above attaches criminal responsibility not only to the perpetrator of such crime but also to any individual who ordered, instigated or organized such plan, or who participated in its execution.

Second alternative

Each participant shall be punished according to his own participation, without regard to participation by others.

2. Commentary

(a) Paragraph (1)

43. Paragraph (1) characterizes conspiracy, namely, participation in a common plan with a view to committing a crime against the peace and security of mankind, as a crime.

44. There are two degrees of conspiracy. The first degree consists in agreement, namely, a concordance of intentions or an accord between two or more individuals with a view to committing a crime. The second degree concerns physical acts to carry out the crime planned.

45. Paragraph (1) concerns agreement. If the draft Code makes agreement a separate offence, regardless of any physical act, it will do so in order to act as

a deterrent. The aim would be to prevent individuals from exonerating themselves on the basis of the argument that they did not participate in the physical act of implementing the proposed plan.

46. Mere agreement to formulate a criminal plan is, in and of itself, a crime against the peace and security of mankind. Such a solution is not peculiar to the crimes under consideration. In many legal systems criminal agreement is a crime, in and of itself, even if it is not followed by a physical act.

(b) Paragraph (2)

(i) First alternative

47. This paragraph concerns the second phase of conspiracy, namely, the execution of the common plan. It combines the concepts of collective responsibility and individual responsibility: any act by any of the participants with a view to executing the common plan simultaneously attaches criminal responsibility to the perpetrator of such act and to all the participants in the conspiracy.

48. This twofold responsibility of participants was laid down in article 6 (c) in fine of the Charter of the Nürnberg Tribunal. Some members of the Nürnberg Tribunal entered major reservations in respect of this twofold responsibility. They considered it unacceptable to hold an individual responsible for crimes that he had not personally committed. Other members, on the other hand, were in favour of strict implementation of article 6 (c) in fine of the Charter of the Tribunal, which was based on the definition of the theory of conspiracy put forward by Chief Prosecutor Jackson. 12/ According to the Chief Prosecutor, conspiracy implies a twofold responsibility: individual responsibility and collective responsibility. In a common plan, each individual is responsible not only for acts committed by him personally in execution of the plan but also for all acts committed by anyone else who participated in the plan, even if the person concerned was not present when the acts in question were committed and was not even informed of their commission.

49. The provision in question owes its existence to the emergence of a hitherto barely known category of participants, namely, organizers. In this context, an organizer is regarded as the individual who conceived of, organized or directed the crime. This type of participation is unquestionably the most dangerous type of participation occurring in our time. Leaders and organizers are not always visible. They give orders and conceive of the crime, but they stay away from the theatre of operations. Since they are not present when the plan is executed, they do not have knowledge of every offence committed by those who execute their orders, particularly since the offences in question are numerous and of a diverse and mass nature. That was so in the case of the major war criminals, who therefore had to be held responsible under the Charter not only for the conception and organization

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12/ With regard to Chief Prosecutor Jackson's closing statement, see the fourth report by the Special Rapporteur (A/CN.4/398 (see footnote 1 above)), para. 123.

of the criminal activity but also for every individual crime committed in execution of the plan formulated by them.

50. This particular responsibility of organizers was clarified in particular by the ideas put forward by A. N. Traïnin, a Soviet professor, in a study entitled "Hitlerite responsibility under criminal law". He became a member of the Soviet delegation to the 1945 London Conference. In the study, whose English version was published in 1945, he distinguishes between two categories of responsible individuals: direct perpetrators and indirect perpetrators of the crime, namely, responsible government officials, members of a military command, financial and economic leaders and others. Such individuals are organizers. Even although they bore a greater responsibility, they would have entirely escaped punishment if only the direct perpetrators of the crimes organized by them had been prosecuted.

51. Article 6 in fine of the Charter of the Nürnberg Tribunal is based on this idea. However, it was Chief Prosecutor Jackson who, where the Tribunal was concerned, linked the idea to the conspiracy theory and gave it the twofold content of individual responsibility and collective responsibility.

52. It should be noted that the words complot and conspiracy are synonymous in the Charter of the Nürnberg Tribunal and that they correspond to each other in the English and French texts of the Charter.

53. The solution chosen by the Tribunal consisted in limiting the application of conspiracy to crimes against peace. The Tribunal was of the view that the crimes against peace referred to in article 6 (a) in fine of the Nürnberg Charter, namely, "planning, preparation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances", could be committed only by responsible government officials linked with one another by collective responsibility.

54. In its 1954 draft 13/ the International Law Commission, unlike the Nürnberg Tribunal, extended the concept of conspiracy to cover all crimes against the peace and security of mankind. Article 2, paragraph 13 (i), of the 1954 draft referred to "conspiracy to commit any of the offences defined in the ... paragraphs of this article". That represents a considerable extension.

55. In many legal systems, the concept of conspiracy has traditionally been applied more to crimes against the State. It is the State that is the target when crimes are directed against its institutions, its territorial integrity or its security.

56. This definition would appear to be too restrictive in the case of crimes against the peace and security of mankind. The State is not the only entity involved, since other entities exist. Crimes perpetrated against the entities in

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13/ Adopted by the Commission at its sixth session, in 1954 (Official Records of the General Assembly, Ninth Session, Supplement No. 9 (A/2693), pp. 11-12, para. 54; reproduced in Yearbook ... 1985, vol. II (Part Two), p. 8, para. 18.

question constitute crimes against humanity. These entities are, for example, of an ethnic, religious and cultural nature. Genocide and apartheid are thus not directed against a State but against ethnic entities. Moreover, the concept of complot or conspiracy was included in the conventions on genocide and apartheid.

57. It should be pointed out, furthermore, that the Nürnberg Tribunal's restrictive interpretation was not uniformly followed by all of the international military tribunals. For example, the concept of collective responsibility was applied in a situation that did not involve a crime against peace. In the Pohl case, Pohl had been accused of having conserved and accounted for loot taken from dead concentration-camp inmates. As a defence, Pohl had invoked the fact that he had not actually transported the stolen goods or removed the gold from the dead inmates' teeth. The United States Military Tribunal stated in the judgement it rendered (case No. 4): "The fact that Pohl himself did not actually transport the stolen goods to the Reich or did not himself remove the gold from the teeth of dead inmates does not exculpate him. This was a broad criminal program, requiring the co-operation of many persons, and Pohl's part was to conserve and account for the loot. Having knowledge of the illegal purposes of the action and of the crimes which accompanied it, his active participation ... in the after-phases [of the action] makes him particeps criminis in the whole affair." 14/ (Emphasis added by the Special Rapporteur).

58. Today, there is an ever-greater need to deal more and more with the continuing growth of collective crime and with the new problems to which it gives rise. That need must be met by means of legal solutions that are geared better to punishment requirements. The argument between those in favour of individual responsibility and those in favour of collective responsibility is thus gradually subsiding.

59. Major crime can no longer be regarded as acts committed by isolated individuals. It is private individuals, organized in associations or groups in order to increase the impact of their action, and sometimes also officials holding a high political, civil or military position, who commit or abet the commission of the crimes under consideration. The law therefore responds to this new dimension of crime by providing a new definition of criminal responsibility, which in the cases in question takes a collective form, since it is becoming increasingly difficult to determine the role played by each participant in a collective crime.

60. It was above all the twofold responsibility implied by the concept of conspiracy that gave rise to reservations by some members of the Tribunal. The French member of the Tribunal, Prof. Donnedieu de Vabres, indicated in this connection that it was "an interesting but somewhat far-fetched construction". The view expressed by that eminent author would perhaps be different today.

61. Studying the phenomenon of collective crime, Messrs. Merle and Vitu indicate that: "the legal problems to which these collective offences give rise no longer occur in entirely the same criminological context as at the time of Napoleon, and the way of solving such problems naturally has a tendency to evolve. Faced with

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14/ American Military Tribunals (see footnote 5 above), case No. 4, vol. V, p. 989.

the two alternatives that immediately come to mind, namely, the individual responsibility of each member of the group based on the role played by him in the action in question, or the collective responsibility of all participants, traditional specialists in criminal law were obviously won over to the first alternative, which, it seemed, was the only option in keeping with the principle of the individualization of the penalty, and rejected the second alternative, of which old forms of legislation had provided too many unfortunate examples. However, that laudable position of principle did not withstand the pressure exerted by the logical course of events for long. While continuing to show the same attachment to the principle of personal criminal responsibility, contemporary specialists in criminal law seem more tempted than their predecessors to draw more extensive consequences from the collective nature of the offence. 15/

62. Some authors who have studied the impact of specific laws on criminal law in general have reached the conclusion that criminal law, which has traditionally been subjective, is increasingly taking the path of anonymity, risk and objectivization. It is a fact that in order to respond to new situations resulting from developments in the field of criminology it is increasingly specific laws that meet the need for punishment, and such laws depart from the principles of traditional criminal responsibility.

63. Moreover, some codes now lay down the principle of collective responsibility. Article 23 of the Yugoslav Penal Code specifies: "Whoever creates or exploits an organization, a band, a conspiracy, a group or some other association for the purpose of committing criminal offences shall be punished for all criminal offences resulting from the criminal plan of such associations as if he himself had committed them".

(ii) Second alternative

64. The second alternative is based on the principle of individual responsibility. Examples of individual responsibility can be found in some penal codes. Article 29 of the Penal Code of the Federal Republic of Germany specifies that "each participant shall be punished according to his own guilt, without regard to the guilt of others".

65. Article 22, paragraph 3, of the Penal Code of the German Democratic Republic goes further, in that it introduces many more nuances. Under the provision in question, the extent of responsibility is assessed on the basis of the seriousness of the act as a whole, the manner in which the participants took joint action, the extent and the effects of the individual's contribution to the act, and his motives, as well as the extent to which he brought about participation by other individuals. The purpose of the provision, which contains more differentiations than the one just referred to, is to determine the precise extent of the responsibility of the individual. The question is, however, whether it is really applicable in the case of crimes such as those under consideration, and whether it

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15/ Merle and Vitu, Traite de droit criminel, Paris, Cujas, p. 622.

is suited to modern criminology and meets the need for punishment of the offences involved.

(c) Conclusion

66. It will be noted that although complicity and conspiracy are two separate concepts, they are very similar and sometimes overlap. The concept of conspiracy implies a certain degree of complicity among the members of the conspiracy, who support, aid and abet one another. As in the case of conspiracy, the concept of complicity implies agreement and a concordance of intentions. The two concepts therefore often produce the same phenomenon, namely, group crime. That is why, moreover, article 6 of the Charter of the Nürnberg Tribunal included organizers and accomplices in the same text in situations where accomplices participated in a common plan.

C. Attempt

1. Draft article 17

67. The Special Rapporteur proposes the following draft article:

> The following constitute crimes against the peace and security of mankind:
>
> Attempt to commit a crime against the peace and security of mankind.

2. Commentary

68. It will be noted that the concept of attempt is not included in the charters of the international military tribunals; it is therefore understandable that the concept was also not included in the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, drawn up by the International Law Commission.

69. On the other hand, attempt is included in article 2, paragraph 13 (iv), of the 1954 draft code. However, the 1954 draft still merely referred to attempt without defining it.

70. Generally, attempt means any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention. This concept has given rise in the past and continues to give rise to interesting theoretical discussions. With regard to the controversies in question, the Special Rapporteur refers the reader to his fourth report. 16/

16/ A/CN.4/398 (see footnote 1 above), paras. 142-145.

71. Unquestionably, the theory of attempt can be applied only to a limited extent in the area of the crimes under consideration. What form does attempt to commit an act of aggression take? When can it be said that commencement of execution of an act of aggression exists? Can the borderline between commencement of the execution of an act of aggression and the act of aggression itself be established? If one considers the crime of threat of aggression, the situation is even more perplexing. Is it possible to speak of attempt to make a threat of aggression? Can one speak of attempt to prepare aggression, or of attempt to breach a treaty? Can one speak of attempt to implement apartheid or of attempt to commit genocide?

72. A whole range of examples can be put forward to prove that the concept of attempt can be applied in the field under consideration only to a limited extent, owing to the nature of the offences involved.

73. The concept of attempt must, however, not be disregarded. Most crimes against humanity (for example, genocide and apartheid) consist in a series of specific criminal acts (for example, murders and assassinations), and attempt is altogether conceivable in such cases.

II. PART TWO - INTERNATIONAL ILLICIT TRAFFIC IN NARCOTIC DRUGS

A. Illicit traffic in narcotic drugs, a crime against peace

1. Draft article X 17/

74. The Special Rapporteur proposes the following draft article:

The following constitute crimes against peace:

(1) Engaging in illicit traffic in narcotic drugs;

(2) "Illicit traffic in narcotic drugs" means any traffic organized for the purpose of the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the conventions which have entered into force.

2. Commentary

(a) Paragraph (1)

75. Paragraph (1) deals with traffic in narcotic drugs as a crime against peace. Naturally, that does not cover traffic in narcotic drugs constituting acts by isolated individuals that are punished by the legislation of the country in which they are perpetrated. What is being dealt with here is large-scale trafficking by associations or private groups, or by public officials, either as principals or accomplices in the trafficking.

76. Such trafficking can give rise to a series of conflicts, for example, between the producer or dispatcher State, the transit State and the destination State. The threat to peace is even greater when organized groups infiltrate Governments, with the result that the State to a certain extent itself becomes the perpetrator of the internationally illicit act.

17/ The Commission will have to decide where this draft article is to be inserted definitively among the crimes against peace.

(b) Paragraph (2)

77. Paragraph (2) concerns substances in which trafficking is considered to be illicit. The substances in question are listed in the conventions in force. It seems unnecessary to list them once again here. The main instruments are the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Geneva Protocol, 18/ and the 1971 Convention on Psychotropic Substances. 19/

(c) Relationship between the draft Code and the conventions in force

78. In defining traffic in narcotic drugs as a crime against the peace and security of mankind, the Code meets the requirements of the current trend towards regarding the phenomenon in question more and more as one of the greatest scourges of mankind.

79. The Convention of 26 June 1936 already required contracting States to undertake to punish illicit traffic in narcotic drugs, conspiracy, attempts and preparatory acts severely, particularly by imprisonment or other penalties of deprivation of liberty. The relevant provisions were included in the 1961 Single Convention.

80. The Vienna Convention of 19 December 1988 20/ calls upon the contracting parties to establish as criminal offences the offences referred to in the provisions of article 3, entitled "Offences and sanctions". In particular, the Convention calls upon the parties to take into account factual circumstances that make the commission of the offences particularly serious, such as "the involvement of the offender in other international organized criminal activities; the involvement of the offender in other illegal activities facilitated by commission of the offence; the use of violence or arms by the offender; the fact that the offender holds a public office and that the offence is connected with the office in question". All the aggravating circumstances referred in the Convention make the criminal nature of the offence more and more pronounced and thus give it the serious nature required for crimes covered by the draft Code.

18/ United Nations, Treaty Series, vol. 976, No. 14152.

19/ Ibid., vol. 1019, No. 14956.

20/ E/CONF.82/15.

B. Illicit traffic in narcotic drugs, a crime against humanity

1. Draft article 1 21/

81. The Special Rapporteur proposes the following draft article:

The following constitute crimes against humanity:

Any illicit traffic in narcotic drugs, in accordance with the requirements laid down in article X of this draft of this Code.

2. Commentary

82. This draft article does not call for lengthy comments. While constituting a threat to peace, drug trafficking also, and above all, constitutes a threat to humanity. It could be the downfall of mankind. The twofold characterization of illicit traffic in narcotic drugs as a crime against peace and as a crime against humanity is therefore fully justified.

21/ The Commission will have to decide where this draft article is to be inserted definitively among the crimes against humanity.